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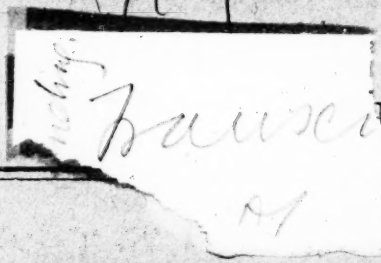

F RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 940.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, APPELLANT,

vs.

F. W. SCHALICKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JULY 23, 1886.

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SUPREME COURT OF THE UNITED STATES.

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1 *Bill of Complaint.*

To the honorable the justices of the circuit court of the United States for the ninth circuit, within and for the district of California, sitting in equity:

The California Artificial Stone Paving Company, a corporation created and existing under and by virtue of the laws of this the State of California, brings this its bill against F. W. Schalicke, a resident of the State of California.

And thereupon your orator complains and says: That heretofore, to wit, before the nineteenth day of July, in the year one thousand eight hundred and seventy, John J. Schillinger, of New York, was the original and first inventor of a certain new and useful invention in concrete pavements; that the same was a new and useful
2 invention, and the following is a partial description of it: said invention consisting of laying a concrete pavement while the material was in a plastic form, and making the pavement in detached blocks or sections, which hardened after being laid; said invention also included fixing tar paper or its equivalent in the joint between the detached blocks or sections to prevent the adjacent parts from adhering, thus forming an artificial stone block pavement possessing all the advantages of a natural stone block pavement at greatly reduced cost; that the same was not known or used by others before the said John J. Schillinger's said invention, and at the time of his application for a patent therefor had not been in public use or on sale for two years, nor abandoned, nor was it proved to have been abandoned.

That the said John J. Schillinger, being so as aforesaid the
3 inventor thereof, on the nineteenth day of July, A. D. 1870, upon due application therefor, did obtain the letters patent of the United States for the said invention, granting and securing to him and his assigns for the full term of seventeen years from the last-named date the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said invention and improvements throughout the United States and the Territories thereof.

Said letters patent were issued in due form of law under the seal of the Patent Office of the United States, and were signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, and bore date the day and year last aforesaid, a description whereof and of said invention more fully appears in said letters patent, which said letters patent are in due form of law and are ready in court to be produced by
4 the plaintiffs or a duly authenticated copy thereof.

That afterwards, to wit, on the second day of May, 1871, upon due application therefor and upon the surrender to the Commissioner of Patents of the United States of the letters patent last aforesaid, new letters patent were duly issued to the said John J. Schillinger for the same invention for the residue of the period then unexpired for which the said original patent was granted; that the letters patent so reissued were issued in due form of law under the

seal of said Patent Office, and were signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, and were dated the day and year last aforesaid, and were delivered to the said John J. Schillinger, whereby there was secured to him, his heirs, administrators, or assigns, for the residue of said term of seventeen years from the said nineteenth day
5 of July, A. D. 1870, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said invention hereinbefore mentioned, a description whereof and of said invention more fully appears in said reissued letters patent, which said reissued letters patent are in due form of law and are ready to be produced in court by the plaintiff, or a duly authenticated copy thereof.

And your orator further shows that by a regular chain of assignment, made in writing and recorded in the United States Patent Office, all the property in said reissued letters patent, and all rights and liberties by them conferred, had been granted and conveyed, within and throughout the whole of the State of California, by and from the said John J. Schillinger to your orator, the California Artificial Stone Paving Company, prior to the 23d day of December, 1876, and your orator says that it is still the owner and
6 holder within and throughout the State of California, except in the counties of Alameda, Contra Costa, Humboldt, Napa, Los Angeles, San Bernardino, Santa Clara, Tulare, and Yolo, of said reissued letters patent, and of the rights, privileges, and liberties by them granted.

That prior to the issuing of said letters patent and said reissued letters patent all proceedings were had and taken which were required by law to be had or taken previous to the issuance or reissuance respectively of letters patent granting special rights and liberties for new and useful inventions.

And your orator further shows unto your honors that always since the grant of the first of said letters patent, in the exercise of the full and exclusive right and liberty so granted as aforesaid, said Schillinger and your orator, while the owner thereof in California,
7 have made, constructed, used, and vended to others to be used the said improvement so patented, and have had and maintained, until the infringement hereinafter complained, the possession of the said improvement and invention under and by virtue of said letters patent, and have never acquiesced in any invasion or infringement of their said rights.

And your orator further shows unto your honors that the respondent herein, having full knowledge of the premises, and in violation of your orator's exclusive right, liberty, and privilege, as aforesaid, and utterly disregarding the same, has, since the 23d day of December, 1876, and since the said assignment to your orator of the said reissued letters patent, and before the filing of this bill of complaint, without the license of your orator or any license under said letters patent in the city and county of San Francisco,
8 in the said district and State of California, *has* manufactured, used, and sold, and still continues to manufacture, use, and

sell, pavements embracing the improvements and inventions described in said reissued letters patent, and so secured to your orator as aforesaid.

And your orator alleges that the pavements made, used, and sold by the respondent were made and used in the city and county of San Francisco, and not in said excepted counties, are infringements of said reissued letters patent, and were made according to the inventions therein described and thereby protected and secured to your orator as aforesaid, and contrary to law and the form of the statutes of the United States in such cases made and provided.

And your orator further says that on or about the 3d day of February, A. D. 1877, a suit at law was commenced in the circ-
9 cuit court of the United States of America in the ninth circuit and in the district of California by your orator, the California Artificial Stone Paving Company, who was then the owner of said reissued letters patent and of the rights, liberties, and privileges by them granted and conferred within and throughout said State against the Oakland Bank of Savings to recover damages for infringement of said reissued letters patent; that in said action the validity of said letters patent was put in issue by the pleadings and fully adjudicated on the trial thereof, and said court, on or about the 15th day of March, A. D. 1878, adjudged said letters patent to be valid in all respects and in full force and effect, and entered a final judgment for damages and costs in favor of the California Artificial Stone Paving Company, and against the defendant,
10 the Oakland Bank of Savings, in said action. Said court then and there had full jurisdiction of the parties to and subject-matter of said action.

And your orator further shows that several other suits, both in California and in the State of New York, were commenced for infringement of said reissued letters *and* patent, and decrees and judgments were entered thereon fully sustaining their validity.

And your orator shows that it is informed and believes, and so states to be true, that the respondent in this action intends to continue to infringe upon said letters patent and to unlawfully use said invention, as he has already been doing, and that respondent is insolvent, and complainant waives damages as to said respondent, except nominal damages.

And your orator further shows unto your honors that it will be subject to great and irreparable injury unless it shall obtain
11 from your honors the relief hereby sought.

And your orator further prays that the respondent herein, F. W. Schalicke, may be restrained by an injunction issuing out of this honorable court from making, using, or vending to others to be used, or transferring in any way, any concrete or artificial stone pavements within the State of California embracing the improvements aforesaid so secured to your orator as aforesaid, and that the pavements so manufactured or purchased, or in any manner obtained by them and now in possession of said respondent, may be destroyed or delivered up to your orator, and for such other and further relief

as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator not
12 only a writ of injunction conformable to the prayer of this bill, but also the writ of subpœna directed to the said F. W. Schalicke, commanding him to appear and answer this bill of complaint and to do and receive what to your honors shall seem meet.

And your orator will ever pray, etc.

M. A. WHEATON,
Solicitor for Complainant.
G. E. HARPHAM,
Of Counsel for Complainant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

George Goodman, being duly sworn, on his oath says that he is the general manager of the company complainant in the foregoing-entitled case; that he has heard the foregoing bill of complaint read and knows the contents thereof, and that the same is true
13 of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

GEORGE GOODMAN.

Subscribed and sworn to before me this 26th day of June, A. D. 1885.

F. D. MONCTON,
Comm'r of U. S. Circuit Court, Dist. of Cal.

Endorsed: Filed June 26, 1885. L. S. B. Sawyer, clerk.

14 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

The President of the United States of America to F. W. Schalicke, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the third day of August, A. D. 1885, to answer a bill of complaint exhibited against you in said court by the California Artificial Stone Paving Company, a corporation created and existing under and by virtue of the laws of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

15 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 109th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Memorandum. Pursuant to Rule 12, *Supreme Court, U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of August next at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

L. S. B. SAWYER, *Clerk*.

Endorsed.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 27th
16 day of June, 1885, and personally served the same on the 27th day of June, 1885, by delivering to and leaving with Mrs. Schalicke, wife of F. W. Schalicke, at defendant's usual place of abode, at the county of San Francisco, in said district, a certified copy thereof, together with a copy of the bill of complaint attached thereto.

San Francisco, June 26, 1885.

M. M. DREW,
U. S. Marshal,
By B. F. AKERMAN,
Deputy.

Endorsed: Filed July 8, 1885, L. S. B. Sawyer, clerk.

17 *Answer.*

Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
F. W. SCHALICKE, Respondent,
} No. 3743.

The answer of said respondent to the bill of complaint of the California Artificial Stone Paving Company, a corporation, complainant.

The respondent, Frederick W. Schalike, saving to himself all manner of benefit of exceptions to the many errors and imperfections in said bill of complaint contained, for answer thereto, or to so much thereof as he is advised is material to be by him answered—
18 Denies that he has ever at any time manufactured or used or sold, or does manufacture, use, or sell, any pavement embracing any improvement or invention described in the reissued letters patent referred to in said bill of complaint; denies that he does or has ever made, used, or sold anything made according to the invention described in the letters patent mentioned in said bill of complaint or in the reissued letters patent therein referred to.

Denies that the said respondent Shalike intends to infringe upon said letters patent or to use said invention or any imitation thereof,

and avers that he has never made or used, and never intends to make or use, any part of said invention.

Denies that he, said respondent, is insolvent, and denies that said complainant will be subject to any injury by any act of
19 this respondent, past or future, in so far as any infringement of said letters patent is concerned.

Said respondent prays that he may be hence dismissed, with his costs in this behalf most wrongfully sustained.

MANUEL EYRE,
Solicitor for Respondent.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Frederick W. Schalike, being duly sworn, says that he is the respondent named in the above-entitled suit; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge.

F. W. SCHALIKE.

Subscribed and sworn to before me this 8th day of July, A. D. 1885.
[SEAL.] L. MENINGER,
Notary Public.

20 Endorsed: Service of a copy of within admitted this — day of July, A. D. 1885. M. A. Wheaton, solicitor for complainant. Filed July 10, 1885. L. S. B. Sawyer, clerk.

21 *The Replication of Complainant to the Answer of Defendant.*

Circuit Court of the United States for the Ninth Judicial Circuit, District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
F. W. SCHALIKE, Defendant.

Replication.

This repliant, saving and reserving to itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the answer of defendant, for replication thereunto saith that it will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by
22 this repliant; that any other matter or thing whatsoever in the said answer of the defendant contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true.

All of which matters and things this repliant is now and will be ready to aver, maintain, and prove as this honorable court shall di-

rect, and humbly prays as in and by its said bill it has already prayed.

M. A. WHEATON,
Solicitor for Complainant.

Endorsed: Service by copy of the within replication is hereby admitted this 14th day of July, 1885. Manuel Eyre, solicitor for defendant.

23 Stipulated that complainant may have two days within which to file this replication.
July 14, '85.

MANUEL EYRE,
Solicitor for Deft.

Filed July 14, 1885.

L. S. B. SAWYER, *Clerk.*

24 *Enrollment.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
F. W. SCHALICKE, Respondent. } No. 3743.

The complainant filed its bill of complaint herein on the 26th day of June, 1885, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the third day of August, A. D. 1885, which is hereto annexed.

The respondent appeared herein on the 10th day of July, 1885, by Manuel Eyre, Esq., his solicitor.

On the 10th day of July, 1885, an answer was filed herein, which is hereto annexed.

25 On the 14th day of July, 1885, a replication to said answer was filed herein, which replication is hereto annexed.

Thereafter a final decree was filed and entered herein in the words and figures following, to wit:

Decree.

At a stated term, to wit, the February term, A. D. 1886, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco on Monday, the 24th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The honorable Lorenzo Sawyer, circuit judge.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant, *vs.* F. W. SCHALICKE, Respondent. } No. 3743.

26 This cause came on regularly for hearing at the February, 1886, term of this court and was argued by counsel and submitted to the court for consideration and decision.

Thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that said complainant's bill herein be, and the same hereby is, dismissed at complainant's cost.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed and entered May 24, 1886. L. S. B. Sawyer, clerk.

27 *Memorandum of Costs and Disbursements.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

THE CALIFORNIA A. S. P. Co., Plaintiff,
vs.
FREDERICK W. SCHALIKE, Defendant.

Disbursements.

Examiner's fees	$19 60
Clerk's fees	16 55
Witness' fees, Glanz & August, Otto & Herman, Benninghofer, & mileage, 80c., Nov. 6 & 24	$12 80
Service of subpœna, 4 wits.	$3
Notary fees, aff. to ans., aff. ser. subp., aff. to cost bill	$1 50
Docket fee	$20
" exam'n of (Nov. 23d) Reichling, Goodwin, Osgood, Van Tassell, Morey; Nov. 6, Schalike & 4 named above; Nov. 24, Morey and Schalike, Otto & Benninghofer	34 00
By consent of counsel taxed at	$107 45

28 L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON, *D'p'y Cl'k.*

UNITED STATES OF AMERICA, *District of California, City and County of San Francisco,* } *ss:*

George H. Bahrs, being duly sworn, deposes and says that he is clerk to the attorney for the respondent in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said respondent; that the items in the above memorandum contained are correct to the best of this deponent's

knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

GEORGE H. BAHRS.

Subscribed and sworn to before me this 24th day of May, A. D. 1886.

[SEAL.] L. MENINGER,
Notary Public.

29 To Milton A. Wheaton, Esq., solicitor for complainant:

You will please take notice that on Wednesday, the 26th day of May, A. D. 1886, at the hour of 10.30 o'clock a. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

MANUEL EYRE,
Attorney for Respondent.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 24th day of May, A. D. 1886.

M. A. WHEATON,
Attorney for Complainant.

Endorsed: Filed this 24 day of May, A. D. 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

30 *Clerk's Certificate.*

Whereupon said pleadings, subpœna, final decree, and memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Enrolled papers. Filed May 24, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

31 *Opinion.*

In the Circuit Court of the United States, District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
F. W. SCHALIKE. } No. 3743.

SAWYER, *Circuit Judge:*

The invention embraced in this patent is doubtless a very useful and valuable one. Schillinger introduced the first successful pavement of the kind. The marking off into squares, during the pro-

cess of formation, in the mode and to the extent adopted by defendant and numerous others claimed to be infringers, undoubtedly controls the line of cracking and secures to a considerable degree in this and in other respects the advantages of the complainant's invention. I think the claims of the patent might very
32 properly have been made broad enough, if they are not so now, to embrace the pavement constructed by the respondent. But I am doubtful whether that pavement is covered by either claims in the patent as issued. Under some of the decisions upon this patent by Judges Blatchford and Shipman, and also a decision of Judge Sage, on the circuit, the defendant's pavement would seem to be an infringement. In view of the doubt I entertain on this point, I shall, for the purposes of this case, hold the defendant's pavement not to be covered by either claim of the patent, and consequently not an infringement, and leave the question to be authoritatively settled by the Supreme Court.

Under the expectation that the case will be promptly appealed and submitted to the Supreme Court upon printed argu-
33 ments, under the rule, at the opening of the next term, I shall suspend judgment for the present in the numerous other cases pending upon the same patent.

Let the bill be dismissed upon the grounds indicated.

Endorsed: Read in open court May 24, 1886. L. S. B. Sawyer, clerk.

34 *Caption to Depositions of Witnesses.*

In the Circuit Court of the United States for the Ninth Judicial Circuit in and for the District of California. In Equity.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
F. W. SCHALIKE, Respondent.
} No. 3743.

Be it remembered that on the 6th day of November, A D. 1885, and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, at my office, room 57, in the United States appraiser's building, on the northeast corner of Washington and Sansome streets, in the city and county of San Francisco, State of California, before me, S. C. Houghton, examiner in chancery of the circuit court of the United States for the
35 ninth circuit and district of California, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

M. A. Wheaton, Esq., appeared as counsel on behalf of complainant, and Manuel Eyre, Esq., as counsel on behalf of respondent.

Following is a record of the proceedings:

FRIDAY, *November* 6, 1885—afternoon.

Present: Mr. Wheaton, solicitor for complainant; Mr. Eyre, solicitor for respondent.

Stipulation.

It is stipulated by and between counsel for the respective parties hereto that the testimony herein may be taken down in short-
36 hand by J. L. Holland and transcribed by him, and that his transcript of the same shall be received in evidence subject to no objections except such as might be urged were the same taken by the examiner in person and in long-hand writing.

Deposition of F. W. Schalike.

Examination-in-chief of F. W. SCHALIKE, on behalf of respondents:

By Mr. EYRE:

Q. 1. State your name, age, place of residence, and occupation.

A. My name is F. W. Schalike; my age is forty-seven years; I live in San Francisco; and my business is laying artificial stone pavements, floors, cellars, and so on.

Q. 2. You were formerly an employé of Charles Molitor, were you not?

A. Yes, sir.

Q. 3. Do you remember the decision against Molitor which is reported in the 7th Sawyer?

37 A. No, sir; not in 7th Sawyer; I don't remember that.

Q. 4. You remember the decision against Molitor restraining him, obtained by the California Artificial Stone Paving Company?

A. No, sir; that is not within my memory.

Q. 5. When did you begin work for yourself?

A. Last year.

Q. 6. About what time?

A. I think it was in May or April; I am not sure; I have got it in my book.

Q. 7. 1884?

A. 1884.

Q. 8. Did you ever lay any artificial stone pavement on your own account before that time?

A. No.

Q. 9. Will you tell me how you lay the artificial pavements—those that you have laid since that time?

38 A. I lay it in two feet, three feet, and four feet widths, in scantlings, from curb to fence line of building line in one strip, and mark it crosswise along the strip upon the top with a joint marker.

Q. 10. Have you ever laid any pavement where you cut between the blocks?

A. No, sir.

Q. 11. How deep does this marker make an indentation on the pavement?

A. About a sixteenth of an inch.

Q. 12. Is this marker that you have given me one that you have been usually using?

A. Yes, sir; right along.

Q. 13. Have you ever used any that cut deeper than this?

A. No, sir.

Q. 14. I will ask you if you know whether this marking on the top does or not confine the cracking of the pavement to the line of the mark?

A. No; it is not confined to the mark.

39 Q. 15. You know that it does not?

A. Yes, sir.

Q. 16. Do you know any instance showing this?

A. There is a pavement in front of the residence of Colonel Barnes, on Sutter street, which shows this.

Q. 17. That is between Jones and Leavenworth?

A. I think it is between Jones and Leavenworth.

Q. 18. Do you know when that pavement was laid?

A. I don't know exactly the time, but it was about six years ago—about five or six years ago.

Q. 19. Were you engaged in laying it?

A. Yes, sir.

Q. 20. Who laid it?

A. Molitor.

Q. 21. And you worked upon it?

A. I worked for Molitor in laying that pavement.

Q. 22. How was that laid—the same way that you lay them?

A. No, sir; it was laid in joint blocks.

40 Q. 23. I mean, was it cut with a trowel?

A. No; it was laid in blocks.

Q. 24. And then marked on the top?

A. Where the joint was in the blocks; marked there.

Q. 25. That is just the way you lay them now, isn't it?

A. No; it is a different thing altogether.

Q. 26. How was that pavement that is in front of General Barnes' laid?

(Objected to as irrelvant to any issues in this case.)

A. That was laid in joint blocks—that is, laid separate in joint blocks, block by block—that is, not laid as I lay them now; it was built with beveled scantlings, block by block, under the Hurlbut patent.

Q. 27. Do you know of any pavements laid from curb to fence and then afterwards marked—laid as you describe that you lay it, where they have split?

41 A. Yes, sir.

Q. 28. Just name some of them.

A. There is one before Doctor Buckley's house, on Larkin street, near O'Farrell, and there is one before Doctor Gibbons', on Califor-

nia street, between Octavia and Laguna, I think; it is right close to that new engine house; this is laid in one strip as I lay it, but marked differently from the way I mark it.

Q. 29. Was there any trowel used in it or any cutting between?

A. No.

Q. 30. It is laid in strips and then marked with this marker?

A. Yes, sir.

Q. 31. Has that split?

A. It has split right straight through.

Q. 32. In the center of the block?

A. Yes, the center of the block.

Q. 33. When you say it has split right through, do you mean that the splits are where the mark was made or in other
42 places?

A. No; that is not what I mean; it is split; it is not split where the mark was made; some pieces are two inches, three inches, and four inches distant from the mark made by the joint marker.

Q. 34. These pavements that you have described as splitting across the blocks in other places than where the mark was made, was the mark any shallower or any deeper than the mark that you use at present?

A. I don't know; I hardly know that it is deeper.

Q. 35. Does the mark that you make upon the pavement when you mark it off into blocks sink as deep or deeper than these pavements that you have described?

A. It is not so deep.

Q. 36. What you make is not so deep?

A. No, sir.

43 Q. 37. And you have never made any pavements in any other way except in the way you have described?

A. No.

Q. 38. Have never cut between the blocks?

A. No.

Q. 39. Have never laid them in separate blocks?

A. No.

Cross-examination of F. W. SCHALIKE by Mr. WHEATON:

Q. 1. You say the pavement in front of Colonel Barnes' place was laid block by block?

A. Yes, sir; I can describe that to you exactly as it was laid.

Q. 2. Please do so.

A. There was a beveled scantling, beveled off and laid on the end of two feet—I don't know exactly how wide the stones are—
44 two feet and a half or so—and the cross-pieces that were laid in for the separate block were beveled too and fitted in that long scantling, and then it was laid block by block. After one block was set it was taken up—the scantling—and another was laid, and if the two were set then the block that was between the two was laid in that. Molitor claimed that as the Hurlbut patent, and the stamp of the Hurlbut patent is on there to-day.

Q. 3. In that case there was no cutting between the block except the marker?

A. Except the marker on the top.

Q. 4. Is that pavement broken across those blocks?

A. Yes; it is all broken there.

Q. 5. Why did the pavement break across the blocks if they were all laid separate; what would make the pavement break across the blocks?

45 A. That is a secret in the working of the cement that nobody knows.

Q. 6. Can you, as an expert, give any reason why the pavement laid block by block with no tar-paper or anything else between the blocks in the joint should break across the joint, while in the Shillinger pavement, where they put tar-paper in the joints, the blocks do not usually break across them?

A. They do not usually, but they break too.

Q. 7. Just answer the question.

A. I don't know, Mr. Wheaton; it must be in the working of the cement.

Q. 8. Why wouldn't the blocks open at the joints instead of opening across the blocks when the cement shrunk?

A. It may be that it settles.

Q. 9. Why didn't the pavement open in the joint between the blocks instead of opening through the blocks and breaking them?

46 A. That is a different thing; it may open between the blocks—the old and new work—what was called the old and new work—it may be that it opens there, but this is the adjoining block that breaks too.

Q. 10. I am asking about this particular pavement in front of Colonel Barnes' and none other.

Mr. EYRE: I object to the question, because he asks him a question without ascertaining whether he knows anything about it.

A. I don't know the reason why it cracks.

By Mr. WHEATON:

Q. 11. Isn't it a fact that where he laid one block there up against another that the blocks would hang together, so that instead

47 of opening in the joint between those blocks the pavement would break right across the blocks when the cement came to shrink afterwards?

A. Where the two blocks came together it shrinks the edge of the blocks on account that they are laid separate.

Q. 12. Are they separate in Barnes' pavement?

A. They are separate.

Q. 13. Are they opened between the blocks?

A. They are separate, certainly, and they open there. You can go and examine them; they are separate, and they are laid separate there.

Q. 14. I don't ask how they are laid, but how they are after they shrink?

A. You have reference after they shrink that they open the other stone; that is, that they crack the other stone, and why don't it keep the cracking at the two blocks—that is the idea that you have.

Q. 15. Yes.

48 A. That is a secret in the cement and I don't know what.

Q. 16. But you do know that in the case of Colonel Barnes' pavement that they have not opened so much between the blocks as to prevent the blocks themselves from splitting across and opening, don't you?

A. These blocks that are laid separate never split open.

Q. 17. (Question 16 repeated.)

A. No.

Q. 18. Isn't it a fact that at this time in Colonel Barnes' pavement some of those blocks adhere together without any opening between them, while the blocks themselves have split across in a cheek that is opened considerably wide?

A. That is in the secret of the cement.

Q. 19. Is that the fact, whether it is a secret of the cement or not?

A. It is a fact; it is there.

49 Q. 20. In what place have you laid pavements since you commenced laying for yourself in 1884, and before this suit was commenced against you?

A. O, several places; do you want the places?

Q. 21. Yes; commence at the first one.

A. Corner of Fulton and Van Ness avenue.

Q. 22. Which corner, and who for?

A. It is the southeast corner of Fulton and Van Ness avenue, for Mrs. Hooker, and on the northwest corner of Steiner and Fulton, for Mr. Hansen; on the southwest corner of Buchanan and Bush, for Mr. Eyre, counsel in this case; on the corner of Octavia and Bush, on the northeast corner, for Mr. Sternheim and Mr. Getz, adjoining, and Mr. Behr, adjoining; Mr. Cook, adjoining; Mr. Popper, adjoining; Mrs. Harrold, adjoining; Mrs. Paul Neumann, in the same block.

50 That is so far on that block. And up on the northwest corner of Gough and Bush for Mr. Murphy; and the piece laid before engine-house No. 15, up on California street, between Laguna and Buchanan; the piece at 952–54 Mission street, and on the southwest corner of Fulton and Franklin. That is all, so far as I can remember.

Q. 23. As you have laid the pavement, how long do you lay these strips of concrete?

A. I lay them from the curb up to the fence.

Q. 24. Lay them across the sidewalk whatever its width may be?

A. Yes; across the sidewalk, whatever the width is.

Q. 25. Into what lengths do you cut those strips usually with the marker?

A. We mark them in two-feet squares with a joint marker, as is here presented of the description of Exhibit 1.

51 By Mr. EYRE:

Q. 26. Is that Exhibit 1 a marker that you have actually used?

A. This one with the handle was actually used, and the one without a handle is one not used at all.

Q. 27. Is that similar to one that you have always used?

A. Yes, sir; the same. They are all made on the same mold.

(The joint markers above referred to are introduced in evidence by respondent and marked respectively "Respondent's Exhibit 1" and "Respondent's Exhibit 2.")

By Mr. WHEATON:

Q. 28. When you say that you have not cut the pavements laid by you between the blocks, what do you mean by blocks?

A. I don't lay it in blocks.

Q. 29. (Question 28 repeated.)

A. I say I don't lay it in blocks. I lay it in strips.

Q. 30. In your examination-in-chief, if I understood you right, you stated that you did not cut it between the blocks; what
52 do you mean by blocks as you used that term in your testimony in your examination-in-chief?

A. That comes in the Molitor case; it comes not in my case; I never laid it in blocks.

Q. 31. (Question 30 repeated.)

A. I say I don't lay it in blocks; I lay it only in strips.

Q. 32. Have the pavements which you have laid, as a general rule, cracked across the blocks after the material shrunk?

A. I never have seen it.

Q. 33. When the material shrinks in the pavements which you have laid where does the opening occur?

A. I have not seen any opening yet in the marks; where I have made marks it was a solid mass.

Q. 34. In the pavements which you have just now testified to as having been laid by you within the last year do you mean to say that there are no openings across the strips which you laid?

53 A. There are no openings across the strips.

Q. 35. Have you examined them to see?

A. I have seen several, and I have not seen any yet.

Q. 36. Have you recently examined those that you laid at first?

A. Yes, sir.

Q. 37. Do you mean to testify that in these pavements laid by you that those strips which reach entirely across the sidewalks remain yet one solid mass of concrete?

A. That has to be examined to be found out.

Q. 38. Do you know whether in these pavements as laid by you, which have been laid now something over a year, the strips that reach entirely across the sidewalk still remain one solid mass of concrete?

A. No.

Q. 39. You do know that the blocks, as marked off on the surface, have not broken across them, do you not?

54 A. There are no blocks marked off; there is only a simple ornament on the top showing the division of two-feet squares.

Q. 40. Doesn't that make a block on the surface?

A. It shows like a block on the surface, but it is not in reality a block.

Q. 41. In the pavements which you have laid have you marked the surface of them off into blocks or not?

A. I separated the surface into two-feet squares.

Q. 42. Now have those squares, two feet in size, broken across in these pavements which you have laid?

A. I have not seen any such breaking.

Q. 43. If those strips have broken at all across them they have broken in those depressions, haven't they?

A. I have not seen any yet.

Q. 44. What workmen have usually been in your employ in the last year in laying the pavements in relation to which you

55 have testified?

A. Mr. Otto Benninghaven and Herman Benninghaven and August Benninghaven and Mr. John Glanz.

Q. 45. As you mark these surfaces into two-feet squares is there a depression formed by bevelling the four sides of those squares in addition to the depth reached by the tongue of the marker?

A. The joint marker will show that; the joint marker shows that—shows the impression on the work.

Q. 46. Haven't your workmen cut with the trowel between these squares that you mentioned?.

A. No, sir; they have not in any case. I would not allow it.

56 *Deposition of Herman Bennighoven.*

Examination-in-chief of HERMAN BENNINGHOVEN, on behalf of respondent, by Mr. EYRE:

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Herman Benninghoven; my age is twenty-two years and upwards; I live in San Francisco, and I am engaged in laying artificial stone pavements.

Q. 2. How long have you worked for Mr. Schalike?

A. I started the first part of September, 1884.

Q. 3. Have you worked for him continuously ever since?

A. Yes, sir.

Q. 4. Do you know whether or not he has laid any pavements during that time on which you have not worked?

A. Not as I know of; I have worked on every one, I think.

Q. 5. Will you please describe the mode in which he has laid these pavements?

A. Yes; in all these pavements he has laid there is one strip from the fence to the curb.

57 Q. 6. After they are laid in those strips are they marked off?

A. He marks them off in two-feet squares with a marker of the character of Exhibit 1.

Q. 7. Has he ever laid any in any other way?
A. No, sir; not while I was working for him.

Cross-examination of HERMAN BENNIGHOVEN by Mr. WHEATON:

Q. 1. Of what material are these pavements laid by Mr. Schalike?
A. Cement and gravel.
Q. 2. In laying this strip is it the same kind of material at the bottom that it is at the top?
A. Yes, sir.
Q. 3. The same proportions of cement and gravel?
A. No; it is coarse on the bottom and fine on the top.
Q. 4. How deep does he lay his bottom course?
A. From two to three inches—two and three-quarters or
58 two and a half; I am not certain.
Q. 5. Of what is that bottom course composed?
A. Cement and gravel.
Q. 6. Portland cement?
A. No; German cement; I don't know whether it is Portland cement or not; it is not the same as the other Portland cement.
Q. 7. What proportions of cement does he put on the bottom course; what proportions of gravel and cement?
A. He takes from eight to nine barrels of gravel to one barrel of cement in the lower course.
Q. 8. In laying the surface, what proportions of cement and gravel does he use?
A. Half-and-half—as much cement as gravel.
Q. 9. He uses fine gravel at the surface, does he?
A. Yes, sir.
Q. 10. How thick does he make the surface layer?
A. Sometimes half an inch and sometimes three-quarters
59 of an inch; generally three-quarters of an inch.

Deposition of Otto Benninghoven.

Examination-in-chief of OTTO BENNINGHOVEN, on behalf of respondent, by Mr. EYRE:

Q. 1. State your name, age, place of residence, and occupation.
A. My name is Otto Benninghoven; my age is thirty years; I live in San Francisco, and I am by occupation an artificial stone pavement layer.
Q. 2. How long have you worked for Mr. Schalike?
A. I started the latter part of July, 1884.
Q. 3. Do you remember when he commenced business for himself?
A. Yes, sir.
Q. 4. Have you worked for him ever since then?
A. Yes, sir.
Q. 5. Has he laid any pavement since he commenced work-
60 ing for himself that you have not been engaged upon?
A. Not as I know of.

Q. 6. You have worked upon every one, then?
A. Yes, sir.
Q. 7. Will you describe how he lays the pavement?
A. Yes, sir. He starts from the curb to the fence or else against the building to the line one strip, and then he takes a joint marker and marks them into two-feet squares.
Q. 8. With a marker similar to this Exhibit 1?
A. Yes, sir.
Q. 9. Have you ever known him or any of his workmen to use a trowel or cut between the blocks in any way?
A. No.

Cross-examination of OTTO BENNINGHOVEN by Mr. WHEATON:

Q. 1. These pavements laid by Schalike are just as good
61 pavements, as far as you can see, as those laid by the Schillinger Company, where the tar-paper is used between the blocks?
A. No.
Q. 2. You say they are not as good?
A. No.
Q. 3. Why not?
A. Because they crack more.
Q. 4. Crack more where?
A. Any place where it is liable to settle it is liable to crack.
Q. 5. Have these pavements which Schalike has laid cracked across the blocks that you know of?
A. What do you mean by "across the blocks?"
Q. 6. Across these squares into which you marked the surface?
A. What do you mean—in the joint or in the center of the block?
Q. 7. In the center of the block.
A. Yes, sir.
Q. 8. Which pavements of these that Schalike has had laid since you have been at work for him have cracked in the center of the block?
62 A. On O'Farrel street; the first job I started to work for him.
Q. 9. In front of whose place?
A. I couldn't say. Mr. Schalike could say. When he laid these pavements he and Molitor was in company. I didn't think of that before. They were in company then.
Q. 10. Were you at work for Schalike then?
A. Yes. They were in company, both of them.
Q. 11. Molitor did a great deal of very miserable work, didn't he?
A. I don't know.
Q. 12. Don't you know?
A. No, sir.
Q. 13. Which one of these pavements that has been laid by Schalike since he has been in business alone has broken across the center of the blocks?
A. The Bay City Market pavement.
Q. 14. On what street?
A. Market.

Q. 15. Whereabouts on Market?

A. Between 6th and 5th, I believe.

63 Q. 16. On which side of Market street?

A. It is on the right-hand side as you go out.

Q. 17. Is it front of the Bay City Market?

A. Yes, sir.

Q. 18. How many of those blocks have broken across the center?

A. I didn't count them.

Q. 19. More than one?

A. Well, I seen more than one if I am not mistaken.

Q. 20. Now, you used the expression "across the center of the block." What do you mean by blocks?

A. Where there is a mark on the top; it is marked into two-feet squares; right through the center of that, where it is marked on the top.

Q. 21. By "block" you mean the two-foot square that is between the four of those marks, do you?

A. Yes, sir.

Q. 22. Have these pavements laid by the defendant any of them cracked in those marks, so far as you know?

64 A. I don't know; not as I could say.

Q. 23. Have you ever looked at them to see?

A. I have looked at some of them—not at all.

Q. 24. Haven't you found any of them cracked in the marks?

A. Not as I know of.

Q. 25. Then why are they not just as good as the pavements laid by the Schillinger company?

A. Because they are liable to crack; it is all one solid mass, while in the Schillinger patent it is laid into blocks, and, if it should happen to settle, the stone would settle, and they can raise that, while they can't do it with this; they will have to break this up and repair it.

Q. 26. They are laid in competition with the Schillinger patent, are they not?

A. How do you mean?

Q. 27. Both parties bidding for the same jobs—that is, Schalike and the Schillinger company bidding against each other for

65 the same jobs where people want artificial stone pavements laid?

A. I don't know anything about that.

Q. 28. Is that a fact that you don't know anything about it?

A. No; I do not.

Q. 29. Don't you know that they are bidding against each other in the market for jobs?

A. Not to my knowledge; I have not seen any bids made.

Q. 30. Then you have been at work for the defendants laying these pavements for over a year and don't know, up to this time, that the pavements laid out by Schalike are competing pavements with the pavements laid by the Schillinger company?

A. Not as I know of.

(It is admitted that, if called and sworn as witnesses on behalf of respondent, August Benninghoven and John Glanz would each give substantially the same testimony as that given by the last
66 witness, Otto Benninghoven.)

Respondent rests.

It is agreed by counsel that complainant is the owner of the Schillinger patent described in the bill.

Waiver as to Reading Depositions to Witnesses and Signing Same by Them.

By agreement of counsel the reading of the above depositions by the witnesses and the signing of the same by them respectively are hereby waived.

The time within which testimony may be taken herein is extended by agreement of counsel for the respective parties to and including the 17th day of November, 1885.

MONDAY, *November* 23, 1885.

Present: Mr. Wheaton, counsel for complainant; Mr. Eyre, counsel for respondent.

Deposition of Louis F. Reichling.

67 Examination-in-chief of LOUIS F. REICHLING on behalf of complainant:

In response to questions of Mr. WHEATON the witness testified as follows:

My name is Louis F. Reichling; my age is twenty-nine years; I live in Oakland, and I am a manufacturer of artificial stone pavement; I have been manufacturing such pavement under the Schillinger patent four years and upwards.

Complainant's Exhibit B, now before me, is a photograph mainly of the sidewalk in front of General Barnes' place, in this city, on Sutter street, between Jones and Leavenworth.

(It is admitted that the General Barnes sidewalk mentioned by the witness is the same sidewalk referred to in the testimony of the witness Schalike as the sidewalk in front of the premises of Colonel Barnes.

68 I took that photograph on November 21st, 1885; I did not see that pavement laid, but it has the appearance of having been slightly cut on the surface when it was laid. The regular lines shown in the photograph on the surface of the pavement represent the joints of the blocks composing the pavement. The irregular lines shown on the photograph represent cracks across the blocks of the pavement. This pavement was laid in adhering blocks. The cracks show that.

The photographs marked "Complainants' Exhibit- C and D," respectively, are two photographs which were taken by me on No-

vember, 18, 1885, and mainly showing part of the pavement in front of Manuel Eyer's place, on the corner of Bush and Buchanan streets, in this city. The white spot or blotch near the centre of the pavement in each of these photographs represents a plaster-of-paris cast, which was taken at that place, in the joints of the
69 pavement.

Complainant's "Exhibit E" is a plaster-of-paris cast, shown in those photographs.

(Complainant puts in evidence the photographs above referred to, marked respectively Complainant's Exhibit B, C, and D, and also the plaster-of-paris cast referred to, marked Complainant's Exhibit E.)

This Exhibit E shows the depth of the indentations in the pavement. That cast represents the joints of the pavement at that place. The long ridge represents the joints cut parallel with the line of the fence and curb; the short ridge represents the joints cut in the pavement, running from the curb to the fence. That cast, Exhibit E, fairly represents the depth of the indentations made by the lines which cut the surface of that pavement into squares. I examined that
70 pavement to see whether or not there were any openings in the joints which are shown by the lines in the photographs. I found openings along the joints in several places. The place where this cast was taken is one place in the joint running parallel with the fence and curb. I also found cracks in the parallel joints on each side of that; those were minute cracks running in the joint at the bottom of the seam; those cracks ran along the joint; those cracks were caused by shrinkage. I did not examine all the joints in the pavement to see whether there were cracks in all of them. I think I examined five or six. I found cracks in those three joints that I have spoken of and in all of those lines running from the curb to the fence. I examined the pavement to see whether there were any blocks broken across, and I did not find any such;
71 at that time there was present with me George Goodman, Theodore Van Tassel, Charles E. Osgood, and Warren W. Morey.

I have read the testimony of Mr. Schalike in this case with reference to the several pavements which he had laid. I examined the pavements mentioned in his testimony laid by him on Bush street, from Gough to Octavia, in front of several residences there—among others Dr. Murphy's.

The pavements represented in the photographs C and D is one of the pavements which Mr. Schalike testified he had laid. The surface of the pavement laid by the defendant on Bush street, between Gough and Octavia streets, was cut into blocks the same as Mr. Eyre's pavement. I examined those pavements mentioned to see whether or not there were cracks in the joints made by cutting the surface into blocks. I found cracks caused by shrinkage
72 in the joints running parallel with the fence in several places in the pavement on Bush street, between Octavia and Gough. I examined this pavement thoroughly and found no cracks any-

where else; no cracks across the blocks; in all the places that I examined I did not find any of the blocks broken across in any of the pavements the defendant has laid. I found no cracks in any of them, except in the cracks of the joints; in all of those I examined the cut in the surface of the pavements had been deep enough to control the cracking. I know that because I examined this pavement and found no cracks anywhere else, except in the joints.

Cross-examination of LOUIS F. REICHLING:

In response to questions of Mr. EYRE the witness testified on cross-examination as follows:

73 These cracks in the joints were small cracks. I did not measure their depth.

Q. Were they a thirty-second of an inch deep?

A. I did not measure the cracks.

Q. They were not over a thirty-second of an inch, were they?

A. I did not measure them.

Q. But you could tell whether they were infinitesimal cracks or whether they had any depth?

A. They were minute cracks caused by shrinking.

Q. Can you give an idea of their depth?

A. I should judge that they ran through the pavement. I did not measure them; I only judge that.

At present it needs close examination to see those cracks. After awhile they can be easily seen. That is my opinion, based on facts.

74 Some of these pavements have been laid for years, and in some of those I have seen plainly cracks which divided the joints. They are so plain that you can see them very easily. I know that the joints in the Schalike pavements are made by a joint cutter. I don't believe they were made by this marker, except one. They were make by a marker similar to that. When I use the term "cut into joints" I mean that there has been a cut or indentation made to control the cracking of the pavement. I say to control the cracking, because I have seen it done. What I mean by cutting in the Schalike pavement is done with an instrument similar to "Exhibit 1."

(It is admitted by both complainant and respondent that if called and examined as witnesses on behalf of complainant George Goodman, Charles E. Osgood, and Theodore Van Tassel, now present, and Warren W. Morey would each testify to substantially the

75 same facts testified to by the witness, Reichling.)

Examination continued, in conformity to agreement of counsel, to the 24th instant, at two o'clock p. m.

TUESDAY, *November* 24, 1885.

Present: Mr. Wheaton, counsel for complainant; Mr. Eyre, of counsel for respondent.

Complainant puts in evidence a certified copy of reissued letters patent, granted May 2d, 1871, to John J. Schillinger, for improvement in concrete pavements, marked "Complainant's Exhibit A."

It is agreed by counsel that the said certified copy may be withdrawn upon the substitution in place thereof of the copy specifications and drawings.

76 It is admitted by respondent that the averments of the bill with reference to the assignment to complainant of said letters patent are true.

Deposition of Warren W. Morey.

Examination-in-chief of WARREN W. MOREY on behalf of complainant:

In response to questions of Mr. WHEATON the witness testified as follows:

My name is Warren W. Morey; my age is thirty years; I live in San Francisco, and my business is laying artificial stone pavements. I have seen the pavement that was laid by defendant, Schalike, on Buchanan street, between Bush and Sutter, in which some of the blocks were taken up and replaced by new blocks. I think three blocks were there taken up and replaced. When those blocks were taken up, two of them, I am sure, showed a crack in the
77 indentation in the joint previous to their being taken up; as to the other one I am not sure. I do not know how deep that crack went. When those blocks were removed I think they were separated from the blocks which were not removed along the line of the indentation which was made by the joint merely at the time the indentation was made, but I am not sure about that; I was not there at the time the joint was made, but they showed the separation on the top. I think they were entirely separated from the other blocks. The blocks adjacent to those which were removed were not broken. The line of the blocks which were removed, against which the new blocks were laid, was the line of indentation which was originally made with a joint marker. I examined that pavement in that particular place three or four times. I examined it before the blocks were removed. I examined it after the blocks
78 had been removed and new ones laid in place of those that were removed. I could tell that the old blocks had been removed and new ones put in their places from the fact that the old blocks showed a crack from the corner of the iron water-box there, which was situated in or near those blocks which were taken up, and had no joints through the center of the blocks, which the new blocks showed in running from the iron box. I don't know as I could explain the difference in appearance on the surface between the new blocks and the old ones, but there is a difference, which can be readily seen by anybody who is accustomed to the work. New work looks newer and smoother than old work does.

(It is admitted by and between complainant and respondent that the pavement referred to by witness Morey in his testimony
79 was originally laid subsequent to the commencement of this suit.)

Complainant rests.

Deposition of F. W. Schalike.

Re-examination of F. W. SCHALIKE on behalf of respondent:

In response to questions of Mr. EYRE the witness testified on re-examination as follows:

The reason why those two blocks, referred to by the last witness, were taken out and replaced was because they were cracked in the center from the box corner to the joint on the old work; that was several weeks, I think, after I had laid them. There was no crack in the indentation made by the marker. The crack ran from the box irregularly across the block. We did not take any of those blocks up; we only took the top surface off. When we took the top surface off there was no division or split underneath where the in-
80 dentation was made by the marker. We had to chisel it carefully out or else we would break the other stone on the surface. It was one mass with the other stone, and we had to chisel it carefully off along the indentation marker which separated it from the adjoining square.

I have recently looked at the pavements laid by me since I went into business for myself. I have found no case where the pavement has split or cracked in the line where we used the marker. I found some were cracked across the whole block.

Recross-examination of F. W. SCHALIKE:

In response to questions of Mr. WHEATON the witness testified, on recross-examination, as follows:

There is a difference in the thickness of the top surface in
81 those pavements. It varies from half to three-quarters of an inch. I could not say how thick the top surface was at the place where I put down the new top material of the blocks, but the general thickness is about half an inch. That is about what we always intend to lay. I have recently examined the joints in the pavements laid by me in front of Mr. Eyre's place, 1822 Buchanan street. There are no blocks there. There is a solid mass there before Mr. Eyre's place. There is no blocks there whatever. The surface is marked off into squares only as far down as one-sixteenth of an inch. I have not seen any of those squares in that pavement that were cracked across the surface. That pavement is laid of the ordinary material of which these artificial stone pavements are laid—that is, gravel and Portland cement.

Q. Why is it that that material in that pavement does not
82 shrink any when it does in so many others laid with the same materials around town?

A. I would be glad if you would explain that. I am not able to. I did not see any cracks in the joints running parallel with the curb and fence in that pavement of Mr. Eyre's. I did see cracks in the joints running the other way. I made the indentations in that pavement with a joint marker along the top of the scantling joints running from the curb to the street, where they did open.

Q. Can you tell any reason why, in the case of the pavements which you laid in which you made the indentations, as shown in the evidence, the opening made by subsequent shrinking followed that indentation from the curb to the fence, and openings do not follow the indentations in the pavement in front of General Barnes' place on Sutter street?

83 A. At General Barnes' place the pavement is laid in adhering blocks. It is a different pavement altogether.

Q. What do you mean by the General Barnes pavement being laid in adhering blocks?

A. It was made separate, block by block.

Mr. EYRE: He evidently does not understand the meaning of the word adhering. He don't mean adhering at all.

The WITNESS: It was adhering or adjoining blocks.

Re-examination of OTTO BENNINGHOFEN on behalf of respondent:

In response to questions of Mr. EYRE the witness testified, on re-examination, as follows:

There were no two blocks removed from the pavement which has been spoken of by the witness- Morey and Schalike. Only a
84 portion of two blocks was removed. I removed those portions with a cold chisel and hammer. There was no division underneath crack that was made by the marker on the top. There were no blocks split underneath that. These portions of the blocks that were removed were a solid mass with the adjoining blocks.

Cross-examination:

In response to questions of Mr. WHEATON the witness testified on cross-examination as follows:

At the place where those blocks were removed there was a tree, and there were probably a couple of inches of stuff there that I had to chisel off to make it a regular square. I believe in one square I took all of the stuff out down to the ground, and in the other case I believe I only removed the top surface. The block, a por-
85 tion of which I removed down to the ground, was right near the curb. It was a granite curb. I did not remove the curb when I removed that block. A portion of the adjoining block I removed when I removed that one by chiseling it out. I removed just an edge of it underneath where it was marked by the joint marker. I chiseled in the center of the mark on top of the block. There were no blocks there to remove. What I removed was a few inches of the stuff—cement and gravel. I removed that to make it

a full square on top. There were trees there before. I did not measure to see how far apart those trees were. I could not say; I have no idea. I could not say whether they were more or less than ten feet apart. I do not know whether they were before one house or two houses.

86 Re-examination of HERMAN BENNINGHOFEN on behalf of the respondent:

In response to questions of Mr. EYRE the witness testified, on re-examination, as follows:

Mr. Schillinger and I together took up these two blocks that Mr. Morey has spoken of in the pavement at the corner of Bush and Buchanan streets; I could not tell how long those blocks had been laid before they were taken out—a few weeks; there was a crack on the surface of those pavements, but it was not in the mark where the joint marker had run; it was irregular through the center of the block; in taking up those two blocks there was no mark or split where the joint marker had been run; it was a solid mass with the next block; I chiseled the top stuff out; the bottom course
87 was not taken out; the bottom course was all one solid mass

Cross-examination of HERMAN BENNINGHOFEN:

In response to questions of Mr. WHEATON the witness testified, on cross-examination, as follows:

There was an iron box imbed-ed in that block of the pavement when the pavement was originally laid; I do not know what made the pavement crack from the corner of that box; I do not know what caused the crack; I saw the crack; that is all I know about it; the reason why I chiseled off the top of that block and relaid it was because they wanted it done; I was ordered to do it by the boss; the mark was not large enough to disfigure the block; it was a small mark; as to its disfiguring the block sufficient to make them
88 want a new block laid because the crack was there, I do not know anything about that; the boss, Mr. Schalike, told me to chisel it up, and I did so.

(Complainant agrees that respondent may at any time before or on the trial produce and introduce in evidence the disclaimer filed by the patentee, Schillinger.)

Waiver, &c.

By agreement of counsel for the respective parties the reading of the above depositions of the witnesses and the signing of the same by them respectively are waived.

Testimony closed.

89 *Certificate of Examiner.*

I certify that previous to giving his testimony each of the wit-

nesses in the foregoing depositions named was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause in the caption of said depositions entitled; that said depositions were taken down in writing by me and, by agreement of counsel, by J. L. Holland, at the place in said caption named, at the several times in said depositions set forth, and in the presence of counsel for the respective parties to said cause, and that the reading of said depositions to said witnesses and the signing thereof by them respectively were by said counsel waived.

I further testify that I am not attorney nor of counsel for any of the parties to said cause, nor in any way interested in the event thereof.

90 In witness whereof I have hereunto set my hand this 25th day of November, A. D. 1885.

S. C. HOUGHTON,
Examiner, &c.

Endorsed: Testimony opened and refiled Jan'y 12, 1886. L. S. B. Sawyer, clerk.

(Here follows diagram, marked page 91.)

92 COMPLAINANT'S EXHIBIT A.

United States Patent Office.

JOHN J. SCHILLINGER, of New York, N. Y.

Letters Patent No. 105,599, dated July 19, 1870; reissue No. 4364, dated May 2, 1871.

Improvement in Concrete Pavements.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, John J. Schillinger, of the city, county, and State of New York, have invented a new and useful improvement in concrete pavement; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing, forming part of this specification, in which drawing—

Figure 1 represents a plan of my pavement.

Figure 2 is a vertical section of the same.

93 Similar letters indicate corresponding parts.

This invention relates to a concrete pavement, which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections.

With the joints of this sectional concrete pavement are combined strips of tar-paper, or equivalent material, arranged between the several blocks or sections in such a manner as to produce a suitable

tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

In carrying out my invention I form the concrete by mixing cement with sand and gravel, or other suitable material, to form a plastic compound, using about the following proportions: One part, by measure, of cement, one part, by measure, of sand, and from three to six parts, by measure, of gravel, with sufficient water to
94 render the mixture plastic; but I do not confine myself to any definite proportions or materials for making the concrete composition.

While the mass is plastic I lay or spread the same on the foundation or bed of the pavement, either in molds or between movable joists of the proper thickness, so as to form the edges of the concrete blocks *a a*, one block being formed after the other.

When the first block has set I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set, and, since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on, and when the pavement is completed each block can be taken up independent of the adjoining blocks.

Between the joints of the adjacent blocks are placed strips *b* of tar-paper, or other suitable material, in the following manner:
95 After completing one block *a* I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is completed, interposing tar-paper between the several joints, as described.

The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost or to be raised or removed separately whenever occasion may require without injury to the adjacent blocks.

The paper when placed against the block first formed does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed after the same has been set up in its place between the joints.

96 In such cases, however, where cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described.

In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks.

What I claim as new, and desire to secure by letters patent, is—

1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar-paper, or its equivalent, between ad-

tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

In carrying out my invention I form the concrete by mixing cement with sand and gravel, or other suitable material, to form a plastic compound, using about the following proportions: One part, by measure, of cement, one part, by measure, of sand, and from three to six parts, by measure, of gravel, with sufficient water to
94 render the mixture plastic; but I do not confine myself to any definite proportions or materials for making the concrete composition.

While the mass is plastic I lay or spread the same on the foundation or bed of the pavement, either in molds or between movable joists of the proper thickness, so as to form the edges of the concrete blocks *a a*, one block being formed after the other.

When the first block has set I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set, and, since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on, and when the pavement is completed each block can be taken up independent of the adjoining blocks.

Between the joints of the adjacent blocks are placed strips *b* of tar-paper, or other suitable material, in the following manner:
95 After completing one block *a* I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is completed, interposing tar-paper between the several joints, as described.

The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost or to be raised or removed separately whenever occasion may require without injury to the adjacent blocks.

The paper when placed against the block first formed does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed after the same has been set up in its place between the joints.

96 In such cases, however, where cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described.

In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks.

What I claim as new, and desire to secure by letters patent, is—

1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar-paper, or its equivalent, between ad-

joining blocks of concrete, substantially as and for the purposes set forth.

JOHN J. SCHILLINGER.

Witnesses:
W. HAUFF.
E. F. KASTENHUBER.

97 Endorsed: U. S. C. C't, Cal. 3743. Complainant's Exhibit A. S. C. H., Ex'r. Opened and refiled Jan'y 12, 1886. L. S. B. Sawyer, clerk.

(Here follow 3 photographs, marked pp. 98, 99, and 100.)

98 COMPLAINANT'S EXHIBIT B.

Endorsed: U. S. [C.] C't, Cal. 3743. Complainant's Exhibit B. S. C. H., Ex'r. Opened and refiled Jan. 12, 1886. L. S. B. Sawyer, clerk.

99 COMPLAINANT'S EXHIBIT C.

Endorsed: U. S. C. C't, Cal. 3743. Complainant's Exhibit C. S. C. H., Ex'r. Opened and refiled Jan. 12, 1886. L. S. B. Sawyer, clerk.

100 COMPLAINANT'S EXHIBIT D.

Endorsed: U. S. [C.] C't, Cal. 3743. Complainant's Exhibit D. S C. H., Ex'r. Opened and refiled Jan'y 12, 1886. L. S. B. Sawyer, clerk.

101 At a stated term, to wit, the February term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 2d day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable George M. Sabin, U. S. district judge for the district of Nevada, assigned to hold and holding circuit court.

Order Allowing Appeal.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
F. W. SCHALICKE. } No. 3743.

On motion of M. A. Wheaton, Esq., solicitor for complainant herein, it is ordered that an appeal from the final decree of said circuit court, filed and entered on the 24th day of May, A. D. 1886, being a day in the February, A. D. 1886, term of said circuit court, in the above-entitled cause, be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States on the appellant giving a bond in the sum of five hundred dollars.

102 At a stated term, to wit, the July term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday the 12th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Allowing Certain Exhibits to be Sent with Transcript.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
F. W. SCHALICKE. } No. 3743.

It appearing to the court that Complainant's Exhibit E and Respondent's Exhibits 1 and 2 in the above-entitled cause cannot be duplicated, it is ordered that the original exhibits herein re-
103 cited may be sent up to the Supreme Court of the United States with the transcript on appeal herein.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed July 12, 1886. L. S. B. Sawyer, clerk.

104 *Bond on Appeal.*

In the Supreme Court of the United States.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Appellant,
vs.
F. W. SCHALICKE, Appellee.

Know all men by these presents that we, Thomas Varney and Francis Reichling, are held and firmly bound unto F. W. Shalicke, said appellee, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said F. W. Schalicke, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

105 Sealed with our seals and dated this 9th day of June, A. D. 1886.

Whereas the above-named The California Artificial Stone Paving Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered by and filed and entered of record in the circuit court of the United States of America of the ninth judicial circuit in and for the district of California on the twenty-fourth day of May, A. D. 1886, being a day in the February, A. D. 1886, term of said circuit court, in the cause entitled The California Artificial Stone Paving Company, complainant, against F. W. Schalicke, respondent, No. 3743:

Now, therefore, the condition of this obligation is such that, if the above-named The California Artificial Stone Paving Com-

C. H. Ex'r. Opened and refiled [illegible]. L. S. B. Sawyer,

102 At a stated term, to wit, the July term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday the 12th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Allowing Certain Exhibits to be Sent with Transcript.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
F. W. SCHALICKE. } No. 3743.

It appearing to the court that Complainant's Exhibit E and Respondent's Exhibits 1 and 2 in the above-entitled cause cannot be duplicated, it is ordered that the original exhibits herein re-
103 cited may be sent up to the Supreme Court of the United States with the transcript on appeal herein.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed July 12, 1886. L. S. B. Sawyer, clerk.

104 *Bond on Appeal.*

In the Supreme Court of the United States.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Appellant,
vs.
F. W. SCHALICKE, Appellee.

Know all men by these presents that we, Thomas Varney and Francis Reichling, are held and firmly bound unto F. W. Shalicke, said appellee, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said F. W. Schalicke, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

105 Sealed with our seals and dated this 9th day of June, A. D. 1886.

Whereas the above-named The California Artificial Stone Paving Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered by and filed and entered of record in the circuit court of the United States of America of the ninth judicial circuit in and for the district of California on the twenty-fourth day of May, A. D. 1886, being a day in the February, A. D. 1886, term of said circuit court, in the cause entitled The California Artificial Stone Paving Company, complainant, against F. W. Schalicke, respondent, No. 3743:

Now, therefore, the condition of this obligation is such that, if the above-named The California Artificial Stone Paving Com-

pany shall prosecute its said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this
106 obligation shall be void; otherwise to remain in full force and virtue.

THOMAS VARNEY. [SEAL.]
FRANCIS REICHLING. [SEAL.]

Sealed and delivered in presence of—
L. S. B. SAWYER.

UNITED STATES OF AMERICA, *District of California,* } *ss:*

Thomas Varney and Francis Reichling, being duly sworn, each for himself deposes and says that he is a householder in said district of California and is worth the sum of five hundred dollars over and above all his just debts and liabilities and exclusive of property exempt from execution.

THOMAS VARNEY.
FRANCIS REICHLING.

Subscribed and sworn to before me this 9th day of June, A. D. 1886.

L. S. B. SAWYER,
Com'r U. S. Circuit Court., Dist. Cal.

Endorsed: Approved. (Signed) Lorenzo Sawyer, circuit judge. Filed June 9, 1886. L. S. B. Sawyer, clerk.

107 In the Circuit Court of the United States for the District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY *vs.* F. W. SCHALICKE. } No. 3743.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing one hundred and six written pages, including three exhibits in photograph, numbered from 1 to 106, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein-entitled cause, except Complainant's Exhibit E and Respondent's Exhibits 1 and 2, the originals of which, by order of the presiding judge, accompany this transcript.

108 Attest my hand and the seal of said circuit court this 13th day of July, A. D. 1886.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk.*

109 UNITED STATES OF AMERICA, *ss:*

To F. W. Schalicke, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Wash-

ington, in the District of Columbia, on the eleventh day of October, A. D. 1886, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States in and for the district of California in the cause wherein the California Artificial Stone Paving Company is appellant and you are appellee, to show cause, if any there be, why the said decree in the said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 10th day of July, A. D. 1886, and of the Independence of the United States the one hundred and eleventh.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

110 [Endorsed:] No. 3743. In the Supreme Court of the United States. The California Artificial Stone Paving Company, appellant, *vs.* F. W. Schalicke, appellee. Citation. Service of a copy of the within citation is hereby acknowledged this 12th day of July, 1886. Manuel Eyre, solicitor for respondent and appellee. Filed July 12, 1886. L. S. B. Sawyer, clerk.

Endorsed on cover: California C. C. U. S. No. 940. The California Artificial Stone Paving Company, appellant, *vs.* F. W. Schalicke. Filed July 23d, 1886.

pany shall prosecute its said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this
106 obligation shall be void; otherwise to remain in full force and virtue.

THOMAS VARNEY. [SEAL.]
FRANCIS REICHLING. [SEAL.]

therein-entitled cause, except Complainant's Exhibit E and Respondent's Exhibits 1 and 2, the originals of which, by order of the presiding judge, accompany this transcript.

108 Attest my hand and the seal of said circuit court this 13th day of July, A. D. 1886.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk.*

109 UNITED STATES OF AMERICA, *ss:*

To F. W. Schalicke, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Wash-

ington, in the District of Columbia, on the eleventh day of October, A. D. 1886, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States in and for the district of California in the cause wherein the California Artificial Stone Paving Company is appellant and you are appellee, to show cause, if any there be, why the said decree in the said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 10th day of July, A. D. 1886, and of the Independence of the United States the one hundred and eleventh.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

110 [Endorsed:] No. 3743. In the Supreme Court of the United States. The California Artificial Stone Paving Company, appellant, *vs.* F. W. Schalicke, appellee. Citation. Service of a copy of the within citation is hereby acknowledged this 12th day of July, 1886. Manuel Eyre, solicitor for respondent and appellee. Filed July 12, 1886. L. S. B. Sawyer, clerk.

Endorsed on cover: California C. C. U. S. No. 940. The California Artificial Stone Paving Company, appellant, *vs.* F. W. Schalicke. Filed July 23d, 1886.

119/401

Office Supreme Court U. S.
FILED
SEP 23 1886
JAMES H. McKENNEY,

No. 940.

SUPREME COURT OF THE UNITED STATES

The California Artificial Stone Paving Co.,
Appellant.

vs.

F. W. Schalicke,
Appellee,

BRIEF OF APPELLANT.

M. A. WHEATON,
Counsel for Appellant.

MANUEL EYRE,
Counsel for Appellee.

In the Supreme Court

OF THE

UNITED STATES,

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY,
Complainant and Appellant,

vs.

F. W. SCHALICKE,
Respondent and Appellee.

APPELLANT'S BRIEF.

The action in this case is in equity, and was brought for an alleged infringement of United States Reissued Letters Patent No. 4364, bearing date May 2nd, 1871, and issued to John J. Schillinger of New York for an improvement in concrete pavements.

The patent has been often tested and sustained in the United States Circuit Courts, and the ques-

tion as to what constituted an infringement of it has often been decided.

Schillinger vs. *Gunther*, 2 Banning, and Arden's Patent Cases, 544.

Schillinger vs. *Gunther*, 3 Ibid., 491.

Schillinger vs. *Gunther*, 4 Ibid., 479.

California Artificial Stone Paving Co. vs. *Perine*, and same vs. *Molitor*, 7 Sawyer's Reports, 190.

Same vs. *Freeborn*, 8 Sawyer, 443.

Kuhl vs. *Mueller*, 21 Federal Reporter, 510.

Schillinger vs. *Greenway Brewing Co.*, 17 Federal Reporter, 244.

In these decisions a disclaimer is mentioned. This disclaimer was in fact made by John J. Schillinger, and we consent that it may be added to the Transcript in this case, as it was actually used in the argument of the case below, and was treated as though it had been regularly put in evidence. The disclaimer was filed March 1st, 1885, and it is in the following language, viz.:

" To the Commissioner of Patents: Your pe-
" titioner, John J. Schillinger, of the City and
" County and State of New York, represents
" that Letters Patent of the United States Re-
" issue, No. 4,364, bearing date, May 2, 1871,
" were granted to him for an improvement in
" Concrete Pavements.

" That he has reason to believe that through " inadvertence, accident or mistake the speci- " fication and claim of said Letters Patent are " too broad, including that of which your Pe- " titioner was not the first inventor; and he " therefore hereby enters his disclaimer to the " following words: ' And since the concrete in " ' setting, shrinks, the second block, when set, " ' does not adhere to the first, and so on,' and " which occurs near the middle of said specifi- " cation, and to the following words near the " end of the specification: ' In such cases, how- " ' ever, where cheapness is the object, the tar " ' paper may be omitted, and the blocks formed " ' without interposing anything between their " ' joints, as previously described. In this latter " ' case the joints soon fill up with sand or dust, " ' and the pavement is rendered sufficiently " ' tight for many purposes, while the blocks are " ' detached from each other, and can be taken " ' up and relaid each independent of the adjoin- " ' ing blocks.'

" Your Petitioner hereby disclaims the form- " ing of blocks from plastic material without in- " terposing anything between their joints while " in the process of formation. Your Petitioner " owns the said patent, and the whole interest " therein, except in the following places or ter-

" ritory, for which he has granted exclusive " licenses, under royalty, or sold rights under " said patent, to-wit: the Counties of Kings, " Queens and Richmond, New York State; " Hartford county, Connecticut; the District of " Columbia; the States of New Jersey, Georgia, " Maryland, Louisiana, Texas, Ohio, Michigan, " Missouri and Illinois, which above-named " States and places comprise all the territory for " which he has sold or granted exclusive licenses " or rights in or under said patent, to the best of " his recollection, knowledge and belief.

" NEW YORK, February 27, 1875.

" JOHN J. SCHILLINGER."

" Witnesses:

" GEORGE FULLER.

" S. S. MENDELSAKER."

The first idea that naturally suggests itself from reading the disclaimer is that the concrete pavements could be laid in blocks by simply making one block after the other, as described in the disclaimer, without interposing anything permanently in the joints between the blocks; and that Schillinger was not the first inventor of a block pavement formed in such a way, and for this reason made the disclaimer. Such, however, is not by any means the fact. When Schillinger took out his patent, he had not tested that method of

laying a pavement, and supposed it could be done. He afterwards, however, made a test and found that the pavement laid in that way, one block after another, would be one continuous solid stone pavement, as the blocks being laid while the material was in a plastic state would adhere and constitute one solid stone instead of remaining separate. It was for this reason that the disclaimer was filed; not because such a pavement ever had been laid by any one else prior to Schillinger's invention, but solely because such a pavement could not be laid as described in the patent. These facts are explained in the decision of his Honor, Mr. Justice Blatchford, rendered August 26, 1879, in the United States Circuit Court for the Southern District of New York, in the case of *John J. Schillinger* vs. *Herman A. Gunther*, reported in 4th Banning & Arden's Patent Cases 479. On pages 483 and 484, he says:

"The evidence shows that the plaintiff believed, when he took the re-issue, that a sectional pavement could be made of plastic concretes, without interposing anything between the blocks. He may not have experimented as much as he ought to have done before arriving at that conclusion. He may have arrived at it on insufficient and inadequate grounds. Still, if he acted in good

faith, it was a mistake. If he made experiments and drew a conclusion from them not wholly baseless, it was not a willful default, although other persons may, from other information, have been of a different opinion, and although other persons would have been slow to draw the same conclusion the plaintiff did from the premises before him. So, too, although the experiments and the conclusion were made and arrived at after the original patent was taken out, in such wise as to destroy the validity of the re-issue so far as such conclusion was concerned, it was proper to make the disclaimer in question, in order to avoid the effect of inserting in the re-issue matter which amounted, if true, to an invention made after the granting of the original patent. The plaintiff states, in his affidavit, made November 22d, 1878, that he has never known any cement pavement constructed in sections formed on the ground for actual use in outdoor work, without the interposition of something while the material was in a plastic state, to form or complete the joints. There is nothing in this that is inconsistent with his statement in the same affidavit that he believed, when he took his re-issue, that the concrete in setting, would shrink, and that after one section had been formed, another section might be formed of the plastic material directly against and in contact with the one al-

ready formed, and the blocks, when completed, would be detached; nor anything inconsistent with the fair result of the evidence.

The experiments on which he rested his belief were not pavements in sections formed on the ground for actual use in outdoor work. As to the conversations with the plaintiff, testified to by witnesses, they are too vague and unreliable to be satisfactory. The fact that the plaintiff, in the fall of 1874, laid, in Washington, from 2,000 to 3,000 square feet of concrete pavement in sections, without anything being interposed between the blocks, with the intention that it should be a pavement of detached blocks such as his specification described, shows that he had not at that time abandoned the idea that a pavement of detached blocks could be made in that way. It was not till January, 1875, that *it clearly appeared that such a pavement was a pavement of* ADHERING BLOCKS, AND NOT A PAVEMENT OF DETACHED BLOCKS.

The foregoing observations serve to show that there was no unreasonable neglect or delay in not filing until March 1st, 1875, the disclaimer in question."

The reason, therefore, for filing this disclaimer was exceptional. Probably few instances have

occurred in which a disclaimer has been filed for the reason that the patentee had found out that what he had described for producing a result would not produce such result for the reason that the laws of nature operated differently from what the patentee supposed they would. In Schillinger's case, he subsequently ascertained that when one block had been formed and the material had become "set" or partially hardened, that the plastic material of which the next adjoining block was formed would, when placed in contact with the first block, fuse or blend with and weld to it so as to make one solid stone of both blocks. If, in fact, it was possible to form an artificial stone pavement in blocks in the manner described in that portion of the patent which was disclaimed, there never would have been any infringements committed after the disclaimer was filed, for the very obvious reason that parties desiring artificial stone pavements divided into blocks could easily have laid it according to this disclaimed description without infringing the patent. Any number of artisans have tried to lay these concrete or artificial stone pavements according to such disclaimed description, but God and Nature was against them, and their pavements would turn out to be one solid stone and possess all the infirmities, defects and

drawbacks of concrete pavements laid in one solid mass.

I do not know so much about the pavements in the East as I do in San Francisco and other California cities. So many cases have been tried here in San Francisco, that there is a great deal of actual common knowledge here which the court will take judicial notice of, which possibly might require proof in the East. The great valleys of California are commonly barren of stone of any kind. It is very costly to get stone from the mountains and transport it to the large cities. While there are large hills in San Francisco and its vicinity that have large deposits of stone, such stone does not come out in good form to be used for paving purposes. Generally the stone throughout the Coast Range of mountains in California is very soft and very light, so much so that, except for the fine gravel with which it is interspersed, it could easily be sawed into blocks with ordinary circular saws.

The artificial stone pavements, or, as they are called in the Schillinger patent, "concrete pavements," are very advantageous. The material is laid upon the ground in a plastic condition, and is tamped down while yet plastic. The bottom of every stone conforms to the irregularities of the earth or foundation which forms its bed. As

every part of the stone has an equal bearing with every other part upon its foundations, on account of being tamped down during the process of formation, every stone rests very solid upon its foundation, so that there is little liability of its ever being disturbed, after it is once laid. The top of the stone being finished last, and while the material is plastic, is easily leveled to the exact elevation of the plane in which its surface is fixed. Another very important advantage of these concrete pavements is that, being laid with Portland cement, they become very much harder than granite or bluestone, or any known natural stone that is not too hard to be chiseled or cut into proper flags or blocks for pavements. These artificial stone pavements have been proven by time to be very much more endurable than natural stone pavements. The first were laid in San Francisco more than twelve years ago, and were put in places where they would encounter the most travel and be subjected to the most wear, and these pavements do not yet show any perceptible wear upon their surfaces.

Schillinger was not the first man to lay down artificial stone pavements. His patent does not claim any such thing as that. There were, however, so many defects existing in artificial stone pavements, as formerly made, that for the paving

of streets they were not in any considerable use. From shrinkage or other causes they would crack and break up in irregular pieces, which would become loosened and thrown out, leaving holes in the pavement, and they would soon become broken up, wherever they were used out of doors where they were subjected to the influences of the hot sun. They were often used for cellar bottoms, and in such places where dampness prevailed constantly and no sun reached them and they did good service.

The one thing which Schillinger did that made such a vast improvement in concrete pavements was *to divide them into blocks.* This was the change that he made, and the only change. His invention consisted *in discovering that it was an improvement* in artificial stone pavements *to divide them into blocks.* Simple as this improvement was it turns out to be one of inestimable value, and one that was not dreamed of before Schillinger's invention. This the Court will see by the adjudications hereinafter presented herein. It has been a common thing for parties who infringed the patent to assert that the mere dividing of these pavements into blocks constituted no invention; that ordinary natural stone pavements were formed in blocks, and stone block pavements were therefore within the common knowledge of the

world; that the mere dividing of the artificial stone pavement into blocks required nothing but the skill of an ordinary mechanic. An answer to these assertions, which answer has so far proved unanswerable, is this, viz.:

Most of these infringers were among the very parties who were well acquainted with natural stone block pavements and they also had a sufficient amount of mechanical skill to know how to divide an artificial stone pavement mechanically in blocks. But *not one of them knew or suspected* THAT IT WOULD BE ANY IMPROVEMENT to the artificial stone pavement to divide it into blocks. If any member of this Court conceives the idea that there was no invention in discovering that it was an improvement to divide these artificial stone pavements into blocks, we shall certainly ask that such idea be dismissed unless it can be accompanied with a declaration either that such division in fact constituted no improvement, or else that while it was known that any mechanic could divide an artificial stone pavement mechanically into blocks, *it was also known that such division would constitute in improvement* to the pavement.

I deny the moral or legal right of any court to decide that it is not an invention to discover that any particular change made in a

machine, or art, or manufacture, or composition of matter, is a new and useful improvement, unless such court can assert that itself knew that such change would be an improvement, or unless there is some evidence to prove that others knew that such change would be an improvement. In many of the most valuable inventions of the age, the mere *mechanical* change could be made by any one without invention; such inventions consisted not in creating the change, but in finding out that such mechanical change constituted an actual improvement.

The bill in this case was dismissed upon the ground that the cutting in the surface of the pavement by the defendant did not constitute an infringement of the patent. The opinion of the learned judge who dismissed the bill is in the Transcript, from folio 31 to folio 34. The opinion agrees with the evidence in the case, which shows that the defendant did *divide the surface of the pavement into squares during the process of formation in such a manner as to obtain all of the advantages obtained by dividing the pavement into blocks by the tar paper division described in the patent.*

According to the decisions of the several Judges who have decided cases brought upon this Schillinger patent, the defendants in this case were infringers of the patent, according to

the conclusions of facts arrived at by the Court in this case. The said opinion says: "The in- "vention embraced in this patent is doubtless a "*very useful and valuable one.* Schillinger *intro-* "*duced the first successful pavement of the kind.*

"The marking off into squares, during the pro- "cess of formation, *in the mode and to the extent* "ADOPTED BY DEFENDANT and numerous others, "claimed to be infringers, *undoubtedly controls the* "*line of cracking and secures to a considerable degree* "*in this and in other respects the advantages of the* "*complainant's invention.* I think the claims of "the patent might very properly have been made "broad enough, if they are not so now, to em- "brace the pavement constructed by the respon- "dent. But I am doubtful whether that pave- "ment is covered by either claim in the patent "as issued. *Under some of the decisions upon this* "*patent by Judges Blatchford and Shipman, and also* "*a decision of Judge Sage,* on the Circuit, *the de-* "*fendant's pavement would seem to be an infringe-* "*ment.* In view of the doubt I entertain on this "point, I shall, *for the purposes of this case,* hold "the defendant's pavement not to be covered "by either claim of the patent, and consequently "not an infringement, *and leave the question to be* "*authoratively settled by the Supreme Court.*

"Under the expectation that the case will be

" promptly appealed and submitted to the Su-
" preme Court upon printed arguments, under
" the rule at the opening of the next term, I
" shall suspend judgment for the present in the
" numerous other cases pending upon the same
" patent. Let the bill be dismissed upon the
" grounds indicated.

As indicated in the foregoing opinion, the decision in this case is *pro forma*, and is made for the purpose of obtaining the decision of this the Supreme Court, as to the correctness of the numerous decisions of Judges Blatchford and Shipman and Judge Sage in the East. Counsel upon both sides agreed at the time to bring the case immediately to this Court by appeal, and submit it under the so-called ninety-day rule.

His Honor, Judge Sawyer, for some reason which I could never understand, seemed to think that because Schillinger's patent describes the division of the pavement into blocks as being made by the interposition of tar paper, that the patent must be so construed as to require something to be not only interposed in the joint between the blocks to create a division during the process of formation, but it must be something so interposed that will be left permanently in the joint after the blocks are completed. That for this reason the cutting of a joint between the

blocks with a trowel or other sharp instrument during the process of formation, and after the plastic material has commenced to set so that it will not again blend with and weld itself to the adjoining block, is not an infringement, notwithstanding that if such division was made by interposing tar paper or tin foil, or any other substance that would remain permanently in the joint, it would be an infringement. This is better shown by the decisions of Judge Sawyer hereinafter quoted, as well as by his decision in this case already noted herein. Judge Sawyer agrees with the Judges in the East that these divisions made by the cutting instruments produces the same advantages and improvement in the pavement which the tar paper divisions of Schillinger produces, and he also agrees with the Judges in the East that Schillinger was the first man that ever laid the artificial stone pavement upon the ground with the material in a plastic condition, and divided it into blocks during the process of formation, and also that so dividing it into blocks is a great and radical improvement in the pavement.

The following are quotations from the decision of the Circuit Court in California, reported in 7th Sawyer, page 190.

"In this suit is involved the construction of

" the patent issued to John J. Schillinger, for an " improvement in concrete pavements. This " patent has been before me on several occasions, " and I have had considerable difficulty in giving " it a satisfactory construction. Previous to com- " ing before me it was at various times before " Judge Blatchford and Judge Shipman, each of " whom had occasion to construe the patent, and " both gave it a construction wider in its scope " than I, on first examination, thought it would " bear. *On further consideration of the patent,* " *and of their views upon the point, I am not pre-* " *pared to say with entire confidence that their* " *construction is not correct.* Judge Blatchford is " undoubtedly an able jurist, and the same may " be said of Judge Shipman. The decisions of " Judges Blatchford and Shipman are looked upon " by the Supreme Court with great respect; and " it is probable that those two Judges have tried " more patent cases than any other two Judges " in the United States now living. I have there- " fore, felt very great diffidence in dissenting " from them in the construction of a patent.

" On former trials of cases involving the rights " of the complainant under this patent, I gave it " a more limited construction than that adopted " by the distinguished Judges mentioned. They " do not hold it necessary, that during the process " of formation of the pavement constructed under

" the Schillinger patent, there should be inter-
" posed between the blocks anything which
" should permanently remain. In the previous
" cases before me, I instructed the jury that, for
" the purpose of determining the question of in-
" fringement in those cases, there *should* be some-
" thing, either tar-paper or its eqivualent, perma-
" nently interposed between the joints. Under
" the construction given to the patent by Judge
" Blatchford, and also by Judge Shipman, there
" can be no doubt but that this patent has been
" infringed by the respondents in both the case
" of the California Artificial Stone Paving Com-
" pany against Perine, and the case of The Cali-
" fornia Artificial Stone Paving Company against
" Molitor; and, I think, after full consideration,
" that, even under the more limited construction
" which I have heretofore adopted, the respond-
" ents in both these cases have infringed.

* * * * * *

" This Schillinger patent is evidently a valu-
" able patent. *Schillinger was the first man who*
" *ever made pavements of this character.* Immedi-
" ately after its discovery it went rapidly into
" very general use, and other parties began to in-
" fringe. The first infringers, as Judge Blatch-
" ford states, cut joints and filled them in with
" pitch or asphaltum. In the specification of the
" Schillinger patent the inventor sets forth: 'With

" the joints of this sectional concrete pavement " are combined strips of tar-paper or equivalent " material, arranged between the several blocks " or sections in such a manner as to produce a " suitable tight joint, and allow the blocks to be " raised separately without affecting the blocks " adjacent thereto.' By Judge Blatchford it was " held that the pitch or asphaltum which was " filled into the cuts along the joints effected the " same purpose as, and was the equivalent of, the " tar-paper.

" Infringers then tried various ingenious " methods of evading the patent. The next " course adopted was the filling of the cuts or " joints by pouring in cement, which is one of " the component parts of the material of which " the pavement is formed, in the same way that " the pitch or asphaltum had been used. This " was held to be an equivalent of the tar-paper, " and an infringement.

" Then it was held that it was not necessary " that there should be any material *permanently* " interposed in the cuts or joints, but that if the " joints were made during the process of forma- " tion by inserting the trowel or other instrument, " cutting a joint substantially as was done in this " case, then the complainant's patent was in- " fringed. It is something very like the infringe-

" ments just described that the respondents in " these cases have been doing—filling in the cuts " with concrete composed of cement and fine " gravel in equal parts, instead of with pitch, as- " phaltum or cement.

* * * * * *

" Although this interposed substance may in " some degree adhere to the edges of the adjoin- " ing blocks, the respondents get, to some extent " at least, the benefit referred to, and the further " benefit of controlling the cracking from con- " traction of the concrete composing the pave- " ment.

" One of the great objections to the solid con- " crete pavements made before Schillinger's " invention, was that *it cracked irregularly, and one* " *of the chief advantages of his invention as shown by* " *the testimony in these cases, is that the openings re-* " *sulting from shrinkage come along the line of the* " *joints, and the blocks themselves do not crack,* al- " though that advantage is not set forth in the " patent. In the pavements constructed by the " respondents *this result has been attained;* and it " has been admitted by the respondents in one " case in this Court in which this Schillinger " patent has been in question, *that the object of* " *running the trowel through at the joints was to so* " *weaken the pavement along these lines as to control*

" *the cracking and leave the blocks as marked off un-*
" *broken.* THIS IS CLEARLY AN INFRINGEMENT, *for the*
" *patentee is entitled to all the benefits which result from*
" *his invention whether he has specified all the benefits*
" *in his patent or not.* So in heaving from frost
" *and in taking up the pavement, the breakage would*
" *be likely to be along the same line.*

* * * * *

" In my judgment, based upon the testimony
" and my own observation of the specimens of
" blocks exhibited in the case, the respondents'
" pavements thus made are not equal to the
" Schillinger pavement ; but then, the respond-
" ents make pavements *which are practical pave-*
" *ments in which the cracking resulting from shrink-*
" *age is controlled by the joints made in the process of*
" *formation*, and in which to some extent the
" blocks can be removed without injury to the
" adjoining blocks, although not so completely
" as in the case of the Schillinger pavement.
" The respondents construct practical pavements,
" which can be made cheaper than those made
" under the Schillinger patent, *having to some ex-*
" *tent the same advantages, obtained by substantially*
" *the same means*, and therefore come in competi-
" tion with the complainant and to a considerable
" extent supersede his patented pavement.

* * * * *

" In the Molitor pavement, a portion of which " was taken up and some of the blocks were in- " troduced as exhibits, the thickness of the upper " course of fine material is not more than half an " inch, and that contains substantially nearly all " the strength of the block, for the lower course " of material in these specimens is of such an in- " ferior character that it can be crumbled to pieces " by rubbing with the fingers. Yet even this is " weakened by the cutting of joints with a trowel, " as before described. If, then, the lower course " is of such a crumbling character, either on ac- " count of not containing a sufficient quantity of " cement, or because of not being properly tamp- " ed and there is no cutting of the joints in that " upper course with the trowel, *the mere marking* " *of that top layer to the extent to which the marker* " *goes in would probably control the cracking. If the* " *tongue of the marker will cut the upper layer to a* " *depth of one-eighth, or even one-sixteenth of an inch,* " *then the entire thickness of that upper layer being but* " *half an inch it is probable that that incision would* " *be sufficient to control the cracking of that upper* " *layer,* and as that layer is the most substantial "" part of the block, that marking might and " probably would *be sufficient to control the crack-* " *ing of the entire block,*

" In my view, therefore, the respondents in

" these two cases, Perine and Molitor have both
" so constructed their pavements as to gain the
" advantages secured to the complainant, by the
" Schillinger patent, and by substantially the same
" means, and they are therefore infringers of that
" patent.

We claim that this decision is the correct rule of law to apply in all this class of cases. And in this position we are sustained by the high authority of Judge Blatchford, Judge Shipman and Judge Sage.

In *Schillinger* vs. *Greenway Brewing Co.*, decided by Judge Blatchford July 11th, 1883, and reported in 17 Federal Reporter, 244, on last part of page 246, Judge Blatchford refers to the foregoing decision in the following language:

" In *California Artificial Stone Paving Co.* vs.
" *Perine* (20 O. G., 813) in May, 1881, in the
" Circuit Court for the District of California,
" (Sawyer, J.,) the defendant's pavement was
" made by cutting the lower course into sections
" with a trowel and doing the same with the up-
" per course, the upper joint being directly over
" the lower joint. Into the open joint in each
" case was loosely put some of the partially set
" material from the top of the laid course, an-
" swering the purpose of tar-paper, and *leaving*

"*the pavement weaker along the joint than in any other* "*place.* This was held to be an infringement."

The case of *Kuhl* vs. *Mueller et al.*

In a still later case, decided July 5th, 1884, by Judge Sage, in the U. S. Circuit Court, Southern District of Ohio, the foregoing decision of the California Court was referred to, as was also the language used by the same Court in the *Freeborn case;* and the construction given to the two cases by the Ohio Circuit Court was to the effect that the two cases, taken together, amounted to an adjudication that if the cutting in the pavement was deep enough to control the cracking, then it was an infringement, and that if the mark on the surface was not a cut that was deep enough to produce the beneficial results of the Schillinger invention, then there would be no infringement of the patent.

Kuhl vs. *Mueller* is reported in 21st Federal Reporter, 510. Referring to the California decision the Court in that case says:

In the case of the *California Artificial Stone Paving Company* vs *Perine*, cited above, Judge Sawyer said:

"One of the great objections to the solid concrete pavements made before Schillinger's invention was that they cracked irregularly, and one

of the chief advantages of his invention, as shown by the testimony in these cases, is that the openings resulting from shrinkage come along the line of the joints, and the blocks themselves do not crack, although that advantage is not set forth in the patent. In the pavements constructed by the respondents this result has been attained, and it has been admitted by the respondents in one case in this Court, in which this Schillinger patent has been in question that the object of running the trowel through at the joints was to so weaken the pavement along these lines as to control the cracking and leave the blocks as marked off unbroken. This is clearly an infringement, for the patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patent or not. So, in heaving from frost and in taking up the pavement the breakage would be likely to be along the same line."

"The defendants, Mueller and Dietrich, have submitted testimony that they have not constructed concrete pavements laid in detached sections, having tar paper or its equivalent between the adjoining sections, but that they have laid their pavements in a solid mass, and while they were yet plastic, *marked the surface with a fish line one-sixteenth of an inch in diameter*, the depth

of the impression made by the line, not in any case exceeding the diameter of the line; that the object in marking the pavement is to relieve the monotony of a plain surface and to give the pavement the appearance of having been constructed of freestone blocks.

* * * * * * *

The complainants submitted testimony tending to prove that the defendants cut joints with the trowel.

* * * * * * *

The conflict in the testimony is irreconcilable; *but there is in the testimony that which furnishes a means of arriving at a satisfactory conclusion* as will presently appear.

The defendants cite the case of *The California Artificial Stone Company* vs. *Freeborn* (17 Fed. Reporter, 735), decided by Judge Sawyer. He says:

" It is insisted by complainant that marking off " the blocks on the surface at the time of laying " the pavement with a marker about one-sixteenth " of an inch in depth is an infringement. I am " unable to perceive that the mere running along " the surface of that blunt and rounded marker " one-sixteenth of an inch in depth, there being

" no cutting elsewhere, is making a joint. I fail
" to see that it is an infringement."

This clearly indicates the true test.

* * * * *

" *Now, if the marker—whether it be a cord or of*
" *any other description is not material—makes a cut or*
" *depression which has the effect to cause the pavement*
" *to break by upheavel or cracking from any cause*
" *along the line of the cut or depression, its use is*
" *clearly an infringement. Whatever depth of cut or*
" *mark will produce the effect stated is as certainly an*
" *infringement as if the blocks or sections of the pave-*
" *ment were entirely separated one from another.* The
" cutting with the trowel, it was held, was an in-
" fringement, although it was not to the entire
" depth of the pavement. The difference is only
" in degree.

* * * * *

" But the exhibits produced (blocks from the
" pavements laid by defendants) show lines of
" division clear, distinct and complete. *If these*
" *were produced by the use of the marker only, it is*
" *incontestable that the use of the marker is an infringe-*
" *ment.* If they were produced by the trowel
" the defendants are infringers, as has been re-
" peatedly held. *Therefore, it is not necessary to*
" *determine whether the marker only was used.* The
" exhibits establish the fact that the pavement

" was divided while yet plastic into blocks and " sections, and if that result was accomplished " by the trowel or by the marker, *either is the* " *equivalent of the tar paper described in the specifica-* " *tion of the patent* under which the complainant " claims.

* * * * *

" *Schillinger was the first to produce the result ac-* " *complished by his tar paper.* He is entitled, and " so is the complainant, as his assignee, *to all* " *means known at the date of his patent, by which the* " *same result can be produced,* or, in the language " of his claim, to tar paper *or its equivalent.*"

Judge Shipman says, in the Gunther case:

" The material part was to make a cement " pavement SEPARATED *into blocks by joints.*"

The "joints," in the Gunther case, were made as follows:

" After the laying of the two adjoining blocks " and while the upper material for the second " block was in a soft or plastic state, a trowel or " other similar instrument was inserted between " the top layers of the first and second block " through the upper layer for *the purpose of mak-* " *ing a separation* OR JOINT *between them,* thus mak- " ing what is commonly known and designated " as a block pavement."

That Schillinger did make the first joint is, at this time, indisputable. In the case of *Greenway* v. *Brewing Co.*, before cited, Judge Blatchford says:

"It is further contended that as plain concrete "pavements formed in blocks existed before, that "there was no patentable invention in making a "joint in them. The defect in such pavements is "clearly pointed out in the original patent and "repeated in the reissued that where there are no "free joints between the blocks they will not "heave separately from the effect of frost and "cannot be raised or removed separately with-"out injury to adjacent blocks."

"*No one remedied this defect before Schillinger.*

"This invention was simple, valuable and "patentable."

Judge Sage says in his decision:

"Schillinger *was the first to produce the result accomplished by his tar paper.*"

In the original California case already quoted, the Court said:

"This Schillinger patent is evidently a valua-"ble patent. *Schillinger was the first man who ever "made pavements of this character.*"

Judge Shipman says in the decision against Gunther, 2d Banning and Arden 544, page 549:

" The improvement and invention consisted in " dividing the pavement into blocks so that one " block might be removed and repaired without " injury to the rest of the pavement. Although " this improvement, however effected, whether by " the insertion of a trowel or by the permanent " interposition of some *other means of separation* " *between the blocks*, NOW appears to have been a " simple invention, yet it was one which the his- " tory of the art *shows to have been previously un-* " *known.*"

The use made by Judge Sage of the two California decisions of this Court from which he extracted in an elementary form a legal test by which to determine in what instances the cut division of the defendants is a mechanical equivalent or substitute for the tar-paper division of Schillinger was fair, and was intelligent and was in strict accordance with elementary and pure law.

If the separation made between the blocks by the cutting was of such a character as to obtain the same new results as were first obtained by the separation of the blocks made by the tar-paper, then the former is the mechanical substitute and equivalent of the latter. Is there a court in Christendom that will deny the correctness of this conclusion. We think not.

All the decisions agree that the advantages of Schillinger's invention result solely from the separation or "joints" which divides the pavement into blocks. The *dividing joints* are the *means* employed, and any other party making *dividing joints* that operate in the same way and produce the same results are using Schillinger's *exact means*. The *division* is there in both cases. All the advantages flow from this division. The division was first made by Schillinger. It was the means *and the only means* by which he produced the new and beneficial results. The defendant uses the division, and *by it alone* obtains the *same beneficial results* because the division operates in exactly the same way for the defendant that it does for the plaintiff and that it did for Schillinger. To say that the defendant can use the dividing joint of which every court has decided Schillinger was the true inventor, because he manufactures this dividing joint a little differently from the manner in which Schillinger manufactured it, does seem to us to be a violation of the best established rules of patent law and of right and justice. It looks wrong to the plaintiffs. It feels wrong to them.

Judge Shipman also decided that the infringement was complete in cases where the division or joint, or blind joint, or whatever the proper

name may be, was confined to the upper part of the pavement.

In the two cases reported—the Perine and Molitor cases and the Freeborn case—a trowel was used, "the cutting with the trowel *being to a* "*greater or less depth*, according to the character "of the material along the line of the cut, in "some portions the cut being doubtless through "the concrete," and when the trowel is run through *it makes an open joint to the extent to which it cuts.* (See 7 Sawyer, first half of page 195 and last half page 196.)

All the courts, therefore, agree with Judge Shipman that it is an infringement to the extent that the joint penetrates into the pavement, whether there is any infringement below that point or not. The claim made by defendants' counsel that there is no infringement unless the blocks are separated all the way down, is answered by the decisions of every court in which these cases have been tried.

The re-isued patent on which this suit is brought has two claims. One is for the arrangement of the tar-paper, and the other is for laying the pavement in blocks. One of these claims was not in the original patent. The re-issue was, however, *applied for and granted within two*

years from the issue of the original patent, and, therefore, both claims are good within the rule laid down by this Court in the recent case of *Wollensak* vs. *Reiher*, 115 U. S., 96.

Many other parties are in the business of making these pavements and marking off blocks on the surface with a joint cutter. *But they all began after the first Schillinger pavement was laid.* They have *all* discovered that such a pavement was a good pavement since Schillinger and his licensees showed them that the Schillinger block pavement was a good one. *None of them knew it before. Not one of them was in the business. Not a foot of such a pavement can be found in San Francisco that was laid until after* the Schillinger patent was granted.

Both Judge Blatchford and Judge Sage have decided directly that the pavement divided into blocks on the surface by *a mere fish-line* indentation infringed the patent.

It is proved time after time in these cases, that the principal advantage of dividing these pavements into blocks is to control the cracking of the blocks. That pavements laid in blocks so large as to constitute continuous sheets will crack has been established by proof. What causes that cracking is a disputed proposition. On our side we have assigned shrinkage of the material as the natural cause. Some defendants have denied

that this was the cause, and have put on experts to prove that the material does not shrink. Still so long as the facts remain that the pavements would crack, and that such cracking was a fatal defect, sufficient to prevent the profitable and general use of such pavements, the cause of the cracking was of little consequence. The defect was the important fact, and so long as this defect was overcome by Schillinger's invention of dividing such pavements into blocks, it still leaves the cause of the defect a matter of no practical importance. The fatal defect of cracking existed, and this was the important fact that kept the pavement out of use. Schillinger overcame the effect of this defect *by dividing the pavement into blocks*. The overcoming of the disastrous effect of the cracking by dividing the pavement into blocks was the important fact that brought the pavement into general use, and made them of such great service to individuals and to the public. Why the pavements cracked when not divided into blocks, and why the effect of dividing them into blocks, was to control the cracking and keep the blocks whole, are questions of no practical value. It is enough that this useful and valuable result was and is accomplished by the invention.

As already mentioned, the Courts have decided

that " the patentee is entitled to all the benefits " which result from his invention, whether he " has specified all the benefits in his patent or " not."

7 Sawyer, top of page 138.

The Courts have often decided that :

" An infringement takes place whenever a par- " ty *avails himself of the invention of the patentee,* " without such variation as will constitute a new " discovery. * * * * * An infringement " *involves substantial identity.* * * * * It is " a copy of the thing described in the spec- " ifications of the patentee, either without " variations, or *with only such variations as are consist-* " *ent with its being in substance the same thing.* * * " * * * * * " If, however," the invention of " the patentee be a machine, or an improvement " on a machine, it will be infringed by a ma- " chine which *incorporates in its structure and oper-* " *ation the substance of the invention,* that is *by an* " *arrangement of its mechanism, which performs the* " *same service, or produces the same effect, in the same* " *or substantially the same way.*

" The question is whether the given effect is " produced substantially by the *same mode of op-* " *eration, and the same combination of powers* and " devices in both machines, *mere colorable or evas-*

" *ive differences cannot defeat the right of the original*
" *inventor.*

" The inquiry, therefore, should be whether
" the *defendant's device is in substance and effect a*
" *colorable evasion of the plaintiff's contrivance*, or
" whether it is really a new and substantially
" different thing. If the defendants have *taken*
" *the same general plan, and applied it to the same*
" *purpose and produced the same effect in substantially*
" *the same mode*, although they have varied the
" form of construction merely, *it will still be* sub-
" stantially, in contemplation of the patent law,
" *the same thing;* otherwise it will not. Whether
" or not one machine is an infringement of
" another, therefore *does not necessarily depend up-*
" *on whether the mechanical constructions are different.*
" But the question is, *whether* (whatever be the
" mechanical construction), *the later machine con-*
" *tains the means or combination found in the pre-*
" *vious machine;* whether taking the structure as
" you find it *you see the new idea completely embodied*
" *in it.* * * * * If the defendants
" have only varied their combination, *by employ-*
" *ing well known mechanical substitutes for some one*
" *or more material elements*, or parts of the plaint-
" iff's combination, *then there is an infringement,*
" *for a mere known mechanical substitute* for a thing,
" for the purpose of determining the question in

"issue, *must be regarded as the thing itself.* * *
"* * When in mechanics one device does a
"particular thing, or accomplishes a particular
"result, *every other device known and used in me-*
"chanics, which skillful and experienced work-
"men know will produce the same result, or do
"the same particular thing, *is a known mechanical*
"substitute for the first device mentioned *for do-*
"ing that thing, or accomplishing that result, although
"the first device may never before have been
"detached from its work, and the second one
"put in its place. *It is sufficient to constitute*
"known mechanical substitutes, that, when a skillful
"mechanic sees one device doing a particular thing,
"he knows the other devices, whose uses he is ac-
"quainted with, will do the same thing."

Carter vs. *Baker*, 1 Sawyer, 512, 515, 516 and 517.

The foregoing are but well recognized elementary principles.

The evidence in these cases all through shows that all the advantages gained by Schillinger by means of his invention were gained by dividing the pavement into blocks during the process of formation, and having the division between the blocks so constructed as to constitute a separation of the blocks and at the same time a water-tight joint.

The advantages gained over the old concrete pavement laid in single sheets, as shown by the patent and by oral evidence and by the practical use of the pavement itself, are:

1. Any one or more blocks may in case of injury, or for any other reason, be taken out and new ones relaid in their place without injury to the adjoining blocks.

This advantage belongs to the defendant's and other similar pavements, and has often been availed of.

Defendant and others have now got the business learned and they know just exactly what materials to use and how to mix and lay them. Their pavements show this. They also know *just how shallow they can make the divisions on the surface and get all the advantages of the division which Schillinger made with tar-paper.*

This advantage of preventing the blocks from cracking is obtained *by the divisions made by* the joint markers used by the defendant.

Whatever advantage is gained by showing the blocks on the surface for purposes of ornamentation is also gained by the defendant. The Schillinger pavement and the defendant's pavements *look alike on the surface.* This advantage, if it is

an advantage, *is one of the results of the Schillinger invention as patented.*

The remaining advantage of the Schillinger invention is the kind of joint made. It is so constructed as to form a division between the blocks sufficient to practically control the cracking; also to allow one block to be removed and relaid without injuring the *adjoining* blocks; also to present the appearance of a block pavement on the surface and at the same time be a water-proof joint when finished.

The joint made by defendant with the joint marker also possesses the advantage of being water-tight to the full extent that the Schillinger joints do. They are all water tight when first laid. If laid over areas, in the shape of arches, etc., they remain permanently water tight. In most cases, however, as laid upon the ground, a portion of the joints will open from the operation of natural causes, either from shrinkage or whatever it is that causes the cracking of large sheets of such pavement to take place. Some defendants pretend to say that it is not shrinkage that causes this cracking, but charge it to other causes. While we think it is shrinkage, we do not care to make any issue of the question. It is doubtless the same cause or causes which caused such cracking that causes part of the joints in both

the Schillinger and defendant's pavements to open with lapse of time and thereby cease to be strictly water-proof joints. Whatever the cause may be, the fact has been often shown that in this respect the different pavements are exactly alike—even when the defendant's pavements are cut only with the present style of device, which is identified in the evidence by the respective names of "joint marker" and "joint *cutter*."

Of course the Court can have no possible doubt by this time that the pavements made by the defendant, in which the surface is divided into blocks by the joint cutters now made and used by them, *possesses every one of the advantages that was gained by the Schillinger invention.* The complainant knows it; the defendant knows it; the Court here knows it; and the public knows it. The public buys one as freely as the other. It is all proved by oral evidence in the cases, by the exhibits produced, by the pavements in common public use, by the fact that several parties, by so using the joint cutters, are now doing a regular business in laying concrete pavements in full competition with the complainant in San Francisco, and with the complainant's licenses in other places, by the fact that no such pavements as the defendants are laying with the use of the joint-marker was ever laid prior to the Schillinger invention.

In the Freeborn case, 8 Sawyer, page 445, the Court held that marking off the surface a sixteenth of an inch deep with the "*marker*" was not making a joint and therefore not an infringement. Almost immediately the "joint markers" of infringers were changed to "joint *cutters*" by increasing the depth of the rib underneath and beveling the wings so that it *would cut deep enough to do all the work required without using the trowel to cut with.*

Schillinger made his blocks connect by a joint which performed the compound operation of separating the blocks from each other sufficiently to gain the advantages of removing an injured block and replacing it with new material, of controlling the cracking and presenting the appearance of a block pavement on the surface to the eye, and at the same time leaving the blocks sufficiently joined together to have a water-tight joint between them. This he did by making first one block of the pavement, then placing a strip of tar paper against the side of the block so made, and then laying the next block against the tar paper. Except for this tar paper the blocks would have adhered and been one solid stone, and would have included the fatal defects of the old solid stone pavements. The tar paper however formed at once *a separation and a joint be-*

tween the blocks, and a new pavement was created.

The defendants in these various cases learned all about the Schillinger patented pavement, the kind of joint used in it, with its compound character, of dividing and yet joining the blocks, its advantages, value and appearance.

Instead of using tar paper in the joints, they divide the surface of the pavements into blocks, with a joint cutter, by cutting lines a short distance into the pavement while it is yet sufficiently plastic to permit them to do it. *By thus cutting the pavements into blocks at the surface they obtain a division* between the blocks *sufficiently to control the cracking* of the blocks, *also to permit the removal of one or more blocks*, and the replacing of the same with new material, *without injury to the adjoining block* ; also, the *appearance on the surface of a block pavement.*

They leave the material undivided below the cut made by the joint cutter, and by so doing, *retain a close water-tight connection between the blocks. The cut in the surface and the undivided material below the cut, together, form a joint that embodies the compound operation of separation and joining together, to an extent that practically is exactly measured by the same characteristic in the Schillinger joints. The operation of the two joints are exactly the same* for all practical purposes, their advantages are the same; their appearance

is the same, and their construction is so nearly alike as to be practically the same. In both there is a partial separation and yet a close connection. The solid material that is left undivided under the cut has the same practical effect as though it was removed and its place filled with tar-paper. It has the same effect as though it was removed and its place filled with cement, floated into it from the surface. In these cases the entire effect produced by putting or leaving the material in the joint is, to make a sufficiently close connection between the blocks—which, with nothing there, would be separated—and to form a water-tight joint. The solid matter thus left in the pavement *under the cut, is left there permanently* and is interposed between the blocks during the process of formation, and such solid matter, in connection with the cut above it, performs all the service and operation of a strip of tar paper placed in the joints and extending from the top to the bottom of the pavement, just a described in the patent.

The question is, whether the separation of the pavement into blocks at the surface with the joint cutter, and joining them at the bottom with the solid material left interposed under the cuts and between the blocks are the same things in law as the separation and joining of the blocks

with the tar-paper. Or in other words, *do the cut above and solid material underneath together constitute a mechanical substitute for the tar-paper joint as described in the patent?*

If a person skilled in the art of laying and making artificial stone would know, from his knowledge of the business, that the cut in the surface and solid material underneath it could be substituted for the tar-paper, and that the same practical results would be produced by such substitution, then in law such cut and solid material is the same thing as the tar-paper, and their use would equally infringe the patent.

The fact has been proved in these cases that a cut in the surface of a stone had often been used by which to locate the break that was to be made in the stone, and prevent such break from running through other parts of the stone. It is a fact so well known from time immemorial that the Court could not fail to take judicial knowledge of it.

Another fact which the Court could not fail to take judicial knowledge of is, that while it was well known that such crease or cut in the surface would control the cracking, it was equally well known that the solid material underneath the cut would, until broken apart, be water-tight, and would hold the two parts of the stone together.

Also that the appearance of such cuts on the surface was perfectly well known, as the cuts had been so often used. In other words, it was perfectly well known that such cut and solid material underneath it formed a water-tight joint between the two parts of the stone, and yet was a joint which so far separated the stone into different blocks that when any cracking of the stone occurred such cracking would follow and be controlled by the division made by the cut.

Such being the case, *the law makes the cut of the joint-marker and the solid material underneath exactly the same thing as the tar-paper in the joint, and just as much of an infringement as though the tar-paper had been interposed and the cut and material underneath had been left out.*

What is there, we ask, that is wrong or inapplicable in the foregoing presentation of the case when the cut is made with the joint cutter alone. *Do not the cut and solid material underneath perform the same offices, and produce the same effect as the tar-paper?* The numerous pavements in San Francisco, at least, so made and in plain view, when compared with the Schillinger pavements in equally plain view around this city, answers yes, with all the power of an immutable, tangible, visible, existing, undeniable and insuppressible fact. The decree to the contrary would be like

decreeing that the very building in which this Court is held does not exist. It is also plain that in producing the same effects as the tar-paper division and joint, the cut and material underneath it *acts in precisely the same way. They divide the material enough to control the cracking, to permit the removal of the blocks, and to present the appearance of a block pavement to the eye, while at the same time they so connect the blocks together as to create a water-tight joint.*

The pith of the law is happily expressed in the case against Perine and Molitor at the end of the decision, in the following language, viz:

"The respondents in these two cases, Perine "and Molitor, have both so constructed their "pavements *as to gain the advantages* secured to "the complainant by the Schillinger patent, *and* "*by substantially the same means;* and they are "therefore infringers of that patent."

All that we ask in these cases is, that the foregoing elementary rule of law be given a practical application to all the pavements laid by infringing parties. It seems to us that the Court cannot help realizing that the pavements laid by various defendants and cut with a joint cutter only are infrigements of the Schillinger patent. They are new pavements, never laid until the

success of the Schillinger invention was demonstrated. None such had ever been laid before.

All that we ask of the Court is, to make a practical application of the law *to the actual facts of these cases*, and that the invention may be protected instead of the parties pirating it. We ask the Court to analyze the invention and see what new means were tested, and what new effects were produced by those means. This the infringers have done long since. The infringers have long since learned that the tar-paper had no value whatever as an ingredient or substance in the pavement. *It was not put there to fill up space, but to perform an office; to produce an effect. That effect was to divide the pavement into blocks, and nothing else.* Except for creating this division, the tar-paper was rather an injury, since it is a perishable article, and in time will wash and work out of the pavement, while the stone will only have increased in hardness and been growing stronger. *Will not the pavements still be Schillinger pavements after the tar-paper is thus worked out of them?* Will not all of their advantages still remain? Will not the blocks still be protected from cracking? Will not the pavements be equally protected from the effects of heaving from frost? Will they not still present the appearance of block pavements to the eye? Can-

not the blocks still be removed without injury to the adjoining blocks? True, the joints may not still be water-tight, but many blocks cease to be water-tight in the Schillinger pavement while the tar-paper is still in them. The infringers understand all these things. They not only understand that the only useful effect of the tar-paper is to make a division of the pavement into blocks by a joint which is water-tight when new, but they also understand the effects of such division as above enumerated. They understand equally well that all the beneficial effects flowing from such division will flow from a *division of the pavement into blocks at the surface with a joint cutter.* The known nature of stone is such that a division which is shallow is as good and produces the same practical results as a division which is deeper. They therefore substitute the shallow division for the deeper one, leaving the solid material underneath the cut, and gain every single advantage that they would gain by using the tar paper division. They thus obtain a joint which is water-tight when new, but which opens from natural causes with lapse of time. They thus make a pavement in which the blocks can be, *and very often have been removed and replaced without injury to the adjoining blocks;* a pavement that presents to the eye the appearance of a block pavement, that withstands the effects of heaving

from frosts, and in which the blocks are prevented from cracking.

The infringers understand that all these results in the Schillinger pavement are the direct results which flow from dividing the pavement by the tar paper. *They do not flow from the tar paper itself nor from the combination of the tar paper and stone. They all flow from the division* which the tar paper makes, *and nothing else. The partial division is the important element in both cases, and* IT IS THE ONLY IMPORTANT NEW ELEMENT THAT EITHER PARTY USES.

Understanding these things, the infringers make an *equivalent division by a well-known equivalent method*, and as a matter of course, instantly *obtain exactly the same results and none other.* The consequence is that pavements are laid in San Francisco exactly so like the complainant's Schillinger pavements in their action and appearance, that one cannot be told from the other, except by finding on the pavement the company's stamp.

These things are well understood by the infringers, by the public and by the complainant. How can the Court possibly fail to see and comprehend them also? We think it will not. Is not the foregoing a perfectly fair and truthful

presentation of the indisputable facts as to the physical effects and results and advantages of the divisions made by both the tar paper and the joint cutter? *Is not the statement true that the cut of the joint cutter, with the solid material underneath, constitute a well-nown mechanical substitute for the tar paper joint*, which at one and the same time *separates and joins* the blocks together as herein described? Is not the description herein given of the *character of both joints* in dividing and yet connecting together the blocks, exactly correct? The several pavements made by the complainant and by several defendants in these cases demonstrate every minute of every day that *one of the joints is an exact equivalent and substitute for the other in the strictest sense of patent law.* Both do the same things and *accomplish the same results and by the same kind of operation.* These results were first applied to pavements by Schillinger. Former concrete pavements were fatally defective for want of such results. While such joints are the mechanical substitutes and equivalents of each other in modern pavements, they are not equivalents or substitutes *of anything used in former pavements.* In the accomplishment of these results the patent covers a radical invention. *It is not* a patent which merely puts into the pavement a *better* joint than had been put into former concrete

pavements, but it is a patent which put into concrete pavements *the first joint.* It comes within the rule as laid down by the U. S. Supreme Court in McCormick *vs.* Talcot, 20 Howard, 402, and in Railway Co. *vs.* Sayles, 3 Otto, 556.

By substituting the words "joint in a concrete pavement" for the word "divider" in the case of McCormick *vs.* Talcott, the language of this court would read as follows:

"If he be the original inventor of the device "or the machine called a joint in a concrete "pavement, he will have a right to treat as in- "fringers all who make joints in concrete pave- "ments operating on the same principle and per- "forming the same functions by analagous means "or equivalent combinations, even though the "infringing joint may be an improvement of the "original and patentable as such; but if the in- "vention claimed be itself but an improvement "on a known joint in concrete pavements by a "mere change of form or combination of parts, "the patentee cannot treat another as an in- "fringer who has improved the original joint and "concrete pavements by use of a different form "or combination performing the same func- "tions."

The language in Railway Co. *vs.* Sayles, 7 Otto, 556, is as follows:

"In such cases, if one inventor precedes all "the rest and strike out something which in- "cludes and underlies all that they produce, he "acquires a monopoly, and subjects them to "tribute."

The foregoing quotations merely apply the state of the art to the construction of the patent for the purpose of ascertaining the scope of the invention; and the scope of the invention is ascertained for the purpose of determining what different devices would be equivalents or substitutes of the particular devices described in the patent. So far as the patentee's invention has developed new results, effects and operations, which had never before been developed, so far his invention is radical, and all other devices which develop the same results, effects and operations, and placed in the same combinations, are equivalents or substitutes of his invention and are covered by the patent. Again, we repeat that the testimony in the California cases and in the cases in the East, has established the fact that *Schillinger was the first one to ever put dividing joints into a concrete pavement*, and his dividing joint, for the first time, developed beneficial results, flowing from a

dividing joint of any kind in a concrete pavement, laid while the material was in a plastic condition. In law, therefore, all other dividing joints, in the same kind of a pavement, which develop the same beneficial results, are equivalents and substitutes of the particular kind of dividing joints which Schillinger described in his patent. The judges in the east apply the state of the art to the construction of patents; hence Judges Shipman and Blatchford and Sage had no difficulty in holding that any and all kinds of dividing joints, no matter how slight as to depth, placed in such kind of concrete pavement, were equivalents and substitutes of the particular kind of dividing joints described by Schillinger in the patents, and were infringements of the patents.

To them the infringements were clear, and we cannot understand why all of the infringements occurring on this coast are not as plain as the light of day.

We respectfully ask that the decree of the Circuit Court be reversed.

Respectfully submitted,

M. A WHEATON,
Solicitor for Complainant.

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No. 940.

SUPREME COURT OF THE UNITED STATES

The California Artificial Stone Paving Co.

Appellant,

vs.

F. W. Schalike,

BRIEF OF APPELLEE.

M. A. WHEATON,
Counsel for Appellant.

MANUEL EYRE,
Counsel for Apellee.

Due Service of the within Brief admitted this ..... *day of* ..... *1886.*

.....
Counsel for Appellant.

J. J. Evans, Stationer and Printer, 406 California St., S. F.

In the Supreme Court

OF THE

UNITED STATES.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY,
Appellant

vs.

F. W. SCHALIKE,
Appellee.

APPELLEE'S BRIEF.

The invention, as stated in the specification to the patent, consists in laying a concrete pavement in sections, "*so that each section* can be taken up, and relaid without *disturbing the adjoining section.*" This is accomplished by placing tar paper between each block or section as laid. It has been held that cutting between the blocks as laid before the concrete has hardened, with a trowel,

constitutes an infringement, this being an equivalent of the tar paper, though the trowel be withdrawn. The idea of all the decisions is that *anything* which makes such separate blocks, that one block may be removed, *without disturbing the adjoining blocks*, is an infringement. Should the pavement be upheaved by frost, each block would come up separate; any one block may be pried up, and will come out a distinct and separate block. This can be done also where cuts have been made with a trowel or other cutting tool; the edges of the block will be jagged, and not so smooth as where the tar paper is used, but virtually each block is separate, and may be removed "*without disturbing the adjoining sections*,"

In all the reported decisions the patent is so interpreted.

In *Schillinger* vs. *Gunther*, 14 Blatchf., 152, After quoting the specifications, Judge Shipman says: "When the pavement is completed each block can be taken up independent of the adjoining block."

The patentee disclaimed "*the forming of blocks from plastic material without interposing anything between the joints while in process of formation.*" If there be nothing interposed between the joints

while in process of formation, there can be no infringement. The evidence shows that the appellee laid his pavement in strips from curb to fence, in one mass, and thereafter marked off the surface with a blunt marker ; (Transcript, p. 11, folio 38, p. 15, folio 50), Exhibit 1 and Exhibit 2, the latter of which is a new one. This marking does not confine even the surface cracking to the line of the mark (Transcript, p. 12, folios 39, 41 ; p. 25 folio 80) ; but if it did that would be no infringement. The patent is not so to mark the pavement when laid as to confine the cracking of the top layer to the indentation made by a marker. As Judge Shipman says in *Schillinger* vs. *Gunther, supra*, page 156 : "The defendant thus makes a block pavement which can be taken up, so far as the blocks into which the top layer is divided are concerned, without injury to the adjoining blocks."

"The plaintiff forms his joint by the permanent interposition of some material between the blocks. * * * The defendant forms *a joint* by the insertion of a cutting instrument *between* the blocks, and then removing the instrument, leaving the joint an open one for the time."

The appellee does nothing of this kind ; he inserts nothing *between* the blocks. After he has

marked the surface, and the pavement has hardened, it is one solid mass, both the coarse under layer and the top layer are each one continuous mass. If you wish to remove a block of the patentee's pavement you can pry it out separately. The evidence here shows that to replace one of the squares in our pavement you must chisel it out. (Transpript, p. 25, folio 80, pp. 26–7, folios 84 to 87.)

That shows the difference; to replace any part of our pavement, we have to chisel or cut out the part from a solid mass, as much a solid mass as if we had never used this marker, or made any indentation on the surface. There are *no blocks* in our pavement. If an upheaval occurred from frost or other cause our pavement would show a mass cracked in all directions; while the patented pavement would come up in blocks the same as if it were laid with separate blocks of granite.

Again, Judge Shipman says (page 156, after describing the old method, which is our method): "The improvement and the invention consisted in dividing the pavement into blocks, so that one block might be removed and repaired without injury to the rest of the pavement." If this be so, then most undoubtedly do we not infringe. We

do *not* divide our pavement into blocks, and no part of it can be removed without injury to the rest of the pavement, except, of course, by chiseling out a portion. The learned Judge says again (page 157), and I quote his language without comment, its applicability to our case being so apparent: "The plaintiff supposed that his invention included a block pavement, in which the blocks were formed either with or without the interposition of something between the joints. He subsequently ascertained that he was mistaken, and that the pavement was not divided into blocks without the interposition of some material to form joints." "He disclaimed the forming of blocks * * without interposing anything between the joints. This disclaimer left the patent *for a pavement*, wherein the blocks were formed by the *interposition* of *some separating material between the* joints."

Appellee never interposed any separating material between the joints. That is the patent and the whole of it, and unless there be some *separating material*, tar paper or an equivalent, a trowel, or something similar to *separate* the blocks, there is no infringement We make no attempt to interpose anything, permanently or temporarily; and it is certainly a hardship to be

driven out of the business of laying pavements, when the most superficial examination would show that we never attempted to use any device, which, by the wildest stretch of the imagination, could be construed into "the interposition of some *separating* material between the joints."

I respectfully submit that it is stretching the claim of this patent to the utmost to hold that partially cutting between sections with a trowel is the interposition of some *separating* material; but as Judge Sawyer observes (7 Sawyer, 138) "He is entitled to all the benefits which result from his invention whether he has specified all the benefits in his patent or not," so I do not cavil at this cutting being found an infringement; but I do assert that when an assignee, such as the appellant herein, seeks to have a mode of marking declared an interposition between the joints, such claim is plainly preposterous. The power lays with the appellant, and has by it been diligently used to stop our business by notifying those contracting with us that if they buy our work they buy a lawsuit, and so unjustly and without a shadow of excuse, they virtually prevent us from laying pavements in what Judge Shipman designates as the old style. The learned Judge of this Circuit, in January, 1883, said: "I am unable to perceive

that the mere running along the surface of that blunt and rounded marker one-sixteenth of an inch in depth, there being no cutting elsewhere, is making a joint, I fail to see that that is an infringement."

Cal. Art. Stone P. Co. vs. *Freeborn*, 7 Sawyer, 445.

That is all we do.

This decision has never been appealed from, or questioned, and in this Circuit we had a right to abide by it.

In the case of this Appellant vs. *Molitor*, 7 Sawyer, 190, Judge Sawyer reviews the decisions, holding that pouring in cement, or the use of pitch, or asphaltum, is the equivalent of tar paper, and that the patent is infringed if any material be interposed, though such interposition be not permanent, but there must be *an interposition* of *something between the joints.*

In July, 1883, Judge Blatchford held that, "The interposition of the trowel, though temporary, is an equivalent for the tar paper, even though the joint be left open after the trowel is removed, and be not made tight."

Schillinger vs. *Greenway Brewing Co.*,
21 Blatchf., 383.

But he held that *something* must be *interposed between the joints*, so that when the pavement was finished each block can be taken up and relaid without disturbing the adjoining blocks. This, in our pavement, is utterly impossible.

And in referring to Judge Shipman's decision, already quoted, he says (p. 386), that it was held an infringement, "*because* any blocks in the upper course could be taken up without injury to the adjoining blocks."

In our pavement this cannot be done.

The test is, was anything permanent or temporary interposed *between the joints*, and can one block be taken up and relaid without disturbing the adjoining blocks. As to our pavement each of these questions must be answered by a decided negative.

In that case, Judge Blatchford, commenting on six English and two United States patents, holds that none of them can be anticipations, because none provide for such a pavement that one block can be removed without disturbing the adjoining

blocks. He says (page 391): "The defect in such pavements is clearly pointed out in the original patent, and repeated in the re-issue; that, where there are no free joints between the blocks, they will not heave separately from the effects of frost, and cannot be raised or removed separately without injury to adjacent blocks. No one remedied this defect before Schillinger."

Brewster laid pavement in Syracuse, in 1841, as appellee does now. "It had no free joints;" ours have none. So Row, in Baltimore, 25 years ago. "But it was not made in sections detachable by free joints," and ours is the same.

It has been claimed by appellant in the printed circulars issued by it, that Judge Sage had decided that marking the surface with a fish line was an infringement, and was so decided by him in

Kuhl vs. *Mueller*, 21 Fed. Rep., 510.

In that case the blocks were brought into Court, and showed clean cuts making separate blocks. There was a trowel used, and the contention of defendants, that they used only a fish line to mark the surface was clearly disproved by the appearance of the blocks produced. The contention that the use of a fish line made separate

blocks is simply puerile, and any remarks of Judge Shipman anent the fish line are at best but *obiter dicta*. They pressed the fish line in with a trowel (page 512); the cut was made with a trowel, and the blocks produced showed clean cuts making separate blocks.

There are some misstatements in the brief of counsel for appellant as to Judge Sawyer's decision and as to the evidence. The evidence in this case is short; it clearly shows what I have claimed as to the mode in which our pavements have been laid. On page 15 of appellant's brief, it is stated that Judge Sawyer held that to infringe there "must be something so interposed that will be left permanently in the joints after the blocks are completed." That is not so. He held that cutting with a trowel, the trowel being, of course, withdrawn, constituted an infringement; that the interposition of anything between the joints infringed, were such interposition permanent or temporary.

There is no testimony at all in this case going to prove what counsel claims on page 34 of his brief. And the statement on page 38, that the advantage stated, viz., "that one or more blocks may be taken out and new ones relaid in their place without injury to the adjoining blocks,"

belongs to the defendant's * * * pavements is simply a glaring perversion of all the testimony in this case. The statement on page 41 as to the markers *cutting* deep enough, etc., is simply contrary to the evidence, which shows a blunt marker, and but one-sixteenth of an inch of indentation. The assertion in the second paragraph on page 42 is gratuitous, and directly the reverse of the evidence; and when counsel writes that our marking permits the removal of one or more blocks, etc., he deliberately states what he knows is the direct opposite of all the evidence adduced. As to the statement on page 44, there is in this case not a scintilla of evidence to such effect; and the end of page 48 is also absolutely false, and must be known to be so. Assertions of counsel so plainly in direct conflict with all the evidence adduced will, I am sure, have no effect.

I respectfully submit that in no remotest manner, allowing the utmost latitude to this invention, whether the patentee has specified such benefit or not, has the appellee infringed in the slightest particular, and that the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

MANUEL EYRE,

Solicitor for Respondent and Appellee.